CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 134

JOHN THOMAS CARTER AND EUGENE PEARSON MACEMORE, APPELLANTS,

vs.

THE COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED JULY 1, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 134

JOHN THOMAS CARTER AND EUGENE PEARSON MACEMORE, APPELLANTS,

vs.

THE COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

INDEX.

	Original	Print
Proceedings in Supreme Court of Appeals of Virginia	1	1
Petition for writ of error	1	1
The facts	2	2
The pleadings	3	2
Assignments of error	3	3
Argument	4	4
Conclusion	20	21
Appendix—Virginia Code, Section 4675 (5)	22	22
Virginia Code, Section 4675 (49a)	22	23
A. B. C. Board Regulation No. 42	23	23
A. B. C Regulation No, 44	24	24
Record from Trial Justice Court of Rappahannock County	25	25
Criminal warrant	25	25
Judgment	26	26
Order allowing appeal to Circuit Court	26	27
Bail bond on appeal	26	27
Sheriff's return	27	28
Bill of costs (omitted in printing)	27	
Order for return of portion of bail bond collateral	28	28
Bail bonds	28	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1943.

—8454

	Original	Print
Record from Circuit Court of Rappahannock County	30	31
Pleas of not guilty and waiver of jury trial	30	31
Judgment	31	31
Order for stay of execution of judgment	32	32
Bill of exceptions	32	33
Stipulation of facts	32	33
Exhibit "A"—Bond posted with Alcoholic Beverage Control Board	34	34
Exhibit "B"—Certificate as to posting of bond	35	35
Motion to strike evidence and dismiss warrant	36	36
Motion for new trial	37	37
Order settling bill of exceptions	37	37
Clerk's certificate	37	37
Opinion, Spratley, J.	38	38
Judgment	46	39
Clerk's certificate (omitted in printing)	47	
Petition for appeal and order allowing same	48	43
Assignments of error	53	46
Citation and service (omitted in printing)	59	
Bond on appeal (omitted in printing)	60	
Praecipe for transcript of record	61	50
Statement of points to be relied upon and designation to print entire record	64	51
Order postponing further consideration of the question of jurisdiction	69	53

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Plaintiffs in Error,

versus

THE COMMONWEALTH OF VIRGINIA, Defendant in Error

Petition for a Writ of Error.

To the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

Your petitioners, John Thomas Carter and Eugene Pearson Macemore, respectfully represent that they are aggrieved by final judgments of the Circuit Court of Rappahannock County, entered September 14, 1942, whereby petitioners were convicted on a warrant issued by M. A. Compton, Justice of the Peace, on May 20, 1942, which said warrant charged petitioners with the violation of the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia and Sections 42 and 44 of a Regulation of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940; in that they "did transport more than one gallon of alcoholic beverages, namely, 56 cases, containing 168 gallons of whiskey, from a point in the State of Maryland within and into the State of Virginia and in Rappahannock County, Virginia, without having posted with the Virginia Alcoholic Beverage Control Board a bond with approved surety, as required by law; and,

[fol. 2] "Further, that the bill of lading or other memorandum of shipment did not specify the route to be traveled by such vehicle while in Virginia; and,

"Further, the consignee shown on the bill of lading or other memorandum of shipment was a person who did not have a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment, namely, R. M. Williard, T/A Eagle Distilling Company, Route 1, Thomasville, North Carolina."

A transcript of the record of the case accompanies this petition and, for convenience, we shall hereafter refer to the portions thereof containing the various pleadings and facts of the case.

The Facts

The case was tried upon an agreed stipulation of facts which was incorporated as a part of the record in the bill of exceptions (R., pp. 11-14).

Briefly summarized the facts are these. On May 20, 1942, petitioners received from a wholesale liquor dealer in Dorsey, Maryland, a shipment of whiskey for the account of a consignee in Thomasville, North Carolina. The whiskey was loaded onto a truck which was driven into Virginia by petitioners who intended to transport the whiskey through Virginia into North Carolina, but they were apprehended and arrested in Rappahannock County.

When apprehended petitioners produced a bill of lading showing the correct amount of whiskey contained in the shipment. The bill of lading disclosed the consignee to be a resident of Thomasville, North Carolina. Under the laws of North Carolina this consignee could not lawfully receive the whiskey at its destination. The bill of lading contained no routeing for the truck to follow while in Virginia.

The truck was registered in the name of Healton Miller, a resident of North Carolina, who had posted bond with approved surety as required under a regulation of the Virginia Alcoholic Beverage Control Board, but the Board had previously notified Miller that the bond had been cancelled upon information that he had the reputation of being a bootlegger in North Carolina. There was no evidence that Miller had ever violated the laws of Virginia

[fol. 3] **The Pleadings**

The case was set for hearing in the Circuit Court of Rappahannock County on July 13, 1942, on the aforementioned warrant. On that day the petitioners appeared in open court and entered their pleas of not guilty to the charges contained in the warrant, waived jury trial and consented to be tried jointly by the Judge. Petitioners and the Commonwealth then submitted to the Judge an agreed stipulation of all of the facts of the case (R., p. 8).

Thereafter the petitioners moved the court to strike out all of the evidence and to dismiss the warrant on five

grounds assigned, which motion was overruled and to which ruling petitioners excepted on the grounds stated. (Bill of Exceptions, R., pp. 14-16.)

On September 14, 1942, the court entered judgment against petitioners finding them both guilty of the charges contained in the warrant and fixing their punishment, to which judgment the petitioners excepted (R., p. 9).

Thereafter the petitioners moved the court for a new trial on the same five grounds assigned in their previous motion to strike out all of the evidence and to dismiss the warrant, which motion was overruled and to which ruling the petitioners excepted on the grounds stated (Bill of Exceptions, R., p. 16).

On September 28, 1942, on motion of petitioners execution of the judgment was stayed for ninety days pending the presenting of this petition (R., p. 10).

A bill of exceptions was granted the petitioners by the court on September 28, 1942 (R., pp. 10-16).

Assignments of Error

Petitioners assign as error the rulings of the court below in overruling their motion to strike out all of the evidence and to dismiss the warrant; in entering final judgment against them; and in overruling their motion for a new trial. The grounds of the motions and the objection to the judgment were identical and, therefore, in order to avoid obviously unnecessary repetition we shall state our assignments of error as one assignment. (In this assignment of error and our argument we have changed the order of the grounds stated in our motions before the court below in order to present a more logical and convenient sequence.)

The Court below erred in overruling petitioners' motion to strike out all of the evidence and dismiss the warrant, in [fol. 4] entering final judgment against petitioners, and in overruling petitioners' motion for a new trial on the grounds that the act of the Virginia Legislature and the Rules and Regulations of the Virginia Alcoholic Beverage Control Board made pursuant thereto which petitioners were charged with violating were unconstitutional and void, in the following particulars, namely:—

(1) That said Act is unconstitutional insofar that it confers upon said Board the power to make said regulations, in that it violates Article III of the Constitution of Virginia

in attempting to delegate to said Board purely legislative powers and functions.

(2) That under the provisions of Section 5 and Section 49-a of the Alcoholic Beverage Control Act, Chapter 94 of Acts of the General Assembly of Virginia of 1934, as amended, Virginia Code Section 4675 (49-a) there was no authority delegated to make such regulations as Sections 42 and 44 of regulations of the Virginia Alcoholic Beverage Control Board, known as Order Number A-1, adopted August 30, 1940, in that such regulations were not within the scope of the powers delegated to said Board under said Act.

(3) That said Act and said Regulations are unconstitutional in that they violate Article I, Section 8, Clause 3 of the Constitution of the United States regulating commerce between the States and/or imposing a burden upon interstate commerce.

(4) That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was a discriminatory action and was unlawful and without authortiy under the provisions of said Act and said Regulations.

(5) That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was unlawful and violative of the defendants' rights under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States.

Argument

We shall sub-divide our argument under the five grounds assigned in our assignment of error above.

For convenience, Section 5 and Section 49-a of the Alcoholic Beverage Control Act and Sections 42 and 44 of the Regulations of the Alcoholic Beverage Control Board are set out verbatim in the appendix to this petition.

[fol. 5] I

Are the Acts of Assembly purporting to delegate the right to make rules and regulations constitutional and valid?

This question of the validity of delegation of the rule-making power is an exceedingly important one and is by no

means free from difficulty. It is conceded that, in this day of increasing complexity of government, it is inevitable that administrative agencies and bureaus must increase in number and in importance; but neither convenience nor the exigencies of the occasion should be permitted to undermine the constitutional principles upon which the Commonwealth was established, and of those principles none is more basic than the absolute separation of executive, legislative, and judicial duties and functions in accordance with Article III of the Constitution of Virginia. "The legislative power of the State shall be vested in a general assembly. * * *" The assembly is charged with the power and duty of making the laws for the state without the right to divest itself of this function or delegate it to executive or administrative officers; subject only to the qualification, if it is a qualification, that the legislature having fixed the policy and the legal principles and standards, it may properly delegate to administrative agencies the duty of finding the fact to which those principles shall apply and some discretion in applying those principles to mere matters of detail within the policy or principle enunciated.

This principle has been jealously guarded by this Court as is evidenced by recent decisions on the subject.

In *Thompson* v. *Smith*, 155 Va. 367, an ordinance of the City of Lynchburg provided that "The Chief of Police is authorized and directed to revoke the permit of any driver (automobile) who, in his opinion, becomes unfit to drive an automobile on the streets of the city". The validity of this ordinances was attacked on the ground that it was an improper delegation of legislative power and in holding the ordinance invalid this Court, through Mr. Justice Epes, said—

"It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government, whether State or municipal, to determine and declare what the law shall be and the legislative [fol. 6] branch of the government may not divest itself of this function or delegate it to executive or administrative officers."

* * * * * * *

"In principle, legislation and administration are quite distinct powers; but in practical application the line which separates their exercise is not clearly marked or easily defined. However, in their definition in practical application lies the difference between government by legislation and government by bureaucracy, which, though contrary to the genius of our government, some courts have gone far towards sustaining."

* * * * * * *

"Mere matters of detail within the policy and the legal principles and standards established by the statute or ordinance, may properly be left to administrative discretion, for the determination of such matters of detail is more essentially ministerial than legislative. In declaring the policy of the law and fixing the legal principles and standards which are to control in the administration of the law, general terms, which gets precision from the technical knowledge or sense and experience of men and thereby become reasonably certain, may be used; and an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by such general terms exist, and whether the provisions of the law so fixed and declared have been complied with in accordance with the generally accepted meaning of the words. *Mutual Film Corp.* v. *Ohio Industrial Commission, supra; Yoe Bow* v. *Cleveland*, 99 Ohio St. 269, 124 N. E. 132, 12 A. L. R. 1424; *Block* v. *Chicago*, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219."

* * * * * * *

"That portion of the ordinance here in question which authorizes the chief of police 'to revoke the permit of any driver, who, in his opinion, becomes unfit to drive an automobile on the streets of the city', fails to declare the policy of the law and fix the legal principles which are to control the discretion of the chief of police in the revocation of licenses in determining what constitutes unfitness to drive an automobile on the streets of the city; and is void because [fol. 7] it delegates powers essentially legislative to an administrative officer."

In *Assaid* v. *Roanoke*, 179 Va. 47, decided January 19, 1942, a license to operate a pool room was revoked by the City Manager of Roanoke under authority of an ordinance which provided—

"The license shall be a personal privilege and shall be granted and transferred only upon the order of the City Manager."

The Court held the ordinance to be invalid and in the course of the opinion by Mr. Chief Justice Campbell, said—

"It must be conceded that, under the police power with which the city is invested, it had the unquestioned power to legally regulate the granting of a license to conduct a pool room, or even to prohibit the operation of a pool room in the city. However, the exercise of the police power must be a valid exercise thereof, and when in its exercise it encounters the barriers erected by the State and Federal Constitutions, it can proceed no further.

"In *Thompson* v. *Smith*, 155 Va. 367, 154 S. E. 579, 71 A. L. R. 604, Mr. Justice Epes said: * * *"

(The language from Justice Epes' opinion which is quoted by us in the first paragraph of our discussion of *Thompson* v. *Smith*, *supra*, is here quoted with approval.)

"It is by this legal tape that the rights of the defendant are to be measured. When the tape is placed upon the ordinance in question, it clearly appears that it violates Article I, Section 11 of the Virginia Constitution and the 14th Amendment to the Constitution of the United States, by reason of its failure to provide for notice and hearing, by undertaking to make the determination of the city manager final and unreviewable, and by not providing for a judicial review thereof.

"If we extend the analysis of the ordinance, it is plain that it arbitrarily empowers the city manager, if he be so inclined, to refuse an ecclesiastic applying for a license to conduct a pool room, and to grant a license to the most notorious criminal in the city. It further empowers the city manager to deny to the one-time gambler the right to show, if he can do so, that he has reformed.

[fol. 8] *"The legality of the ordinance is to be tested not by what has been done under it, but by what may, by its authority, be done.* (Italics supplied.)

"It further appears, from an analysis of the ordinance, that it delegates legislative authority to a ministerial officer. It is true that the law-making body may make a legislative determination under the police power, without notice and hearing to the person affected, *but the legislative body has no power to delegate to a board or an administrative officer its own power to act, without notice and hearing.* This was specifically held in *Thompson* v. *Smith, supra.* (Italics supplied.)

"Our conclusion is that the ordinance under which the defendant was tried and convicted is invalid.

"It follows, therefore, that the judgment of the lower court will be reversed and annulled, and an order will be entered in this court discharging the defendant from further custody."

These principles are by no means novel or restricted to Virginia for the identical doctrines have been enunciated very recently by the Supreme Court of the United States in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; 79 L. Ed. 446 (The hot oil case), and in *Schecter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 79 L. Ed. 1570 (the "sick chicken" or N. R. A. Case). In both of these cases the Supreme Court of the United States held acts of Congress to be unconstitutional on the ground that attempted delegations of power by Congress to the executive violated the constitutional principles here asserted.

Upon examination of the Virginia Beverage Control Act, we find two sections which may be pertinent—

(1) Section 5, of Chapter 255, of the Acts of 1936, and
(2) Section 49-a of Chapter 255 of the Acts of 1936.

It is believed to be significant that the original Alcoholic Beverage Control Act, Chapter 94 of the Acts of 1934, contained no inhibition against the transportation of alcoholic beverages legally acquired. The only provision on the subject being found in Section 50 which provided that any person not a common carrier who should have, possess * * * or transport alcoholic beverages which are acquired by such person, or any person for whom he is acting, in violation of the provisions of the act shall be guilty of a misdemeanor.

[fol. 9] This Act of 1934, under Section 5 gave the Alcoholic Beverage Control Board the right to make rules and regulations for carrying out the provisions of the act.

In 1936, the original act, which had been prepared by a group of eminent lawyers, was re-enacted with certain changes in phraseology and additions, among which was the addition of Section 49-a, which makes it a misdemeanor to transport alcoholic beverages in violation of rules and regulations of the Board.

As it is conceded in this case that the liquor transported was legally acquired, Section 5 can have no application and the disposition of the case must be governed by Section 49-a of the act of 1936. We here quote the relevant provisions of this section which is now carried in Michie's Code as Section 4675 (49-2):

"The transportation of alcoholic beverages other than wine * * * within, into or through the State of Virginia in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Board pursuant to this section.

"The Board may adopt such regulations governing the transportation of alcoholic beverages * * * within, into or through the State of Virginia in quantities in excess of one gallon as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages * * * in excess of one gallon in violation of such regulations shall be guilty of a misdemeanor and punished as provided in Section 62 of this act."

As this is the section of the act which prohibits the transportation of alcoholic beverages through Virginia, whether said beverage was acquired legally or illegally it is apparent that here the case against the defendants must rest. And this is recognized in the warrant for the charge in that they "did unlawfully violate the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia and Sections 42 and 44 of a regulation of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940:—In that they did * * *", etc.

Under Section 49-a the transportation is prohibited "except in accordance with regulations adopted by the Vir-

ginia Alcoholic Beverage Control Board, pursuant to this section". So it is to this section *and this section only* that [fol. 10] we must look for the legislative grant of authority to make rules and regulations which these defendants are charged with violating.

We then come to the gist of the matter—the validity of this provision.

"The board may adopt such regulations governing the transportation of alcoholic beverages * * * within, into and through Virginia in quantities in excess of one gallon *as it may deem necessary* to confine such transportation to *legitimate purposes* and may issue transportation permits in accordance with such regulations." When this provision is measured by the standards laid down by this court as hereinbefore indicated it would seem to be fatally defective. There is no question of fact to be determined by the administrative agency, there is no exercise of discretion as to details with which the legislature might be unable to acquaint itself, there is no clearly defined, legislative policy enunciated. Intoxicating liquor may only be transported in accordance with rules which the board "may deem necessary to confine such transportation to legitimate purposes". Who can say what a board "may deem necessary"? How far can the board go? Shall this board be permitted to adopt the most ridiculous regulations and when questioned reply—"We deemed it necessary. We have been given unrestricted and untrammeled discretion and we have exercised it. We are trying to confine this transportation to 'legitimate purposes'."

Then, who is to say what are legitimate purposes? There is probably no subject upon which there is more disagreement than that of legitimate purpose when that term is applied to intoxicating beverages. It is worthy of note that the act does not use the customary terms such as "lawful" or "purposes permitted by law", but the vague and indefinite word—"legitimate". And if the Board deemed the rule necessary to confine transportation to legitimate purposes it may adopt it and one who violates that rule is guilty of a crime and yet—

"It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be sur-

rendered for convenience or in effect nullified for the sake of expediency."

(Justice Epes in *Thompson* v. *Smith, supra*, and with approval by Chief Justice Campbell in *Assaid* v. *Roanoke, supra.*)

[fol. 11] *"The legality of the ordinance is to be tested not by what has been done under it, but by what may, by its authority, be done."*

(Chief Justice Campbell, in *Assaid* v. *Roanoke, supra.*)

Of course, if the section of the statute is invalid the rules adopted pursuant thereto must fall and these defendants have violated no valid law of Virginia.

II

Are the rules and regulations promulgated by the Alcoholic Beverage Control Board proper and valid expressions of the authority purported to be granted under the Acts of Assembly?

The rules with which these defendants are charged with violating are known as Sections 42 and 44 of Order No. A-1 adopted August 30, 1940. These rules may be briefly summarized as follows:

Any person transporting alcoholic beverages within, into or through the State of Virginia shall—

(1) Post with the Board a bond with approved surety in the penalty of $1,000, upon condition that such person will not unlawfully transport or deliver alcoholic beverages within, into or through the State of Virginia, and evidence that the bond has been given must accompany the beverages during transportation.

(2) The beverages must be accompanied by a bill of lading or other memorandum of shipment signed by the consignor showing the description of the beverages, the name and address of the consignor, the name and address of the consignee, the route to be traveled by such vehicle in Virginia, and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

(3) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

(4) The name of the consignor shall be the name of the true consignor and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee shall be the name of the true consignee who has previously authorized in writing the shipment of the [fol. 12] beverages and who has a legal right to receive such beverages at the point of destination shown on the bill of lading.

The warrant in this case (R., p. 1), charges defendant with—(1) Failure to post the bond with approved surety as required by law; (2) That the bill of lading did not specify the route to be traveled in Virginia; and (3) The consignee shown on the bill of lading was a person who did not have a legal right to receive such alcoholic beverages at the point of destination.

If we assume that Sections 5 and 49-a of the Act are constitutional and valid in every respect and that the Board is thereby clothed with the authority to make regulations affecting the transportation of alcoholic beverages through the State, it is, nevertheless, proper to examine and scrutinize the rules and regulations of the Board made pursuant thereto in order to ascertain whether or not the promulgation of such rules constitutes a valid exercise of the powers granted to the Board under said statutes. Such rules are unauthorized if they were not contemplated by the Legislature in the enactment of the statutes, and unless the power to make them was expressly or by necessary implication under the language of the statutes delegated to the Board they are void and invalid.

In all cases the rules and regulations may be tested in the courts to determine whether they are directed to the accomplishment of the purposes of the Statute under which they are made, and the regulations may not extend the statute or modify its provisions. (See 11 American Jurisprudence 958, and cases cited.)

In construing the language of the statutes containing delegation power to public officers or adminitsrative agencies, the general rule seems to be that the statutes are to be strictly construed against the delegation of such power and any doubtful or uncertain language must, of course, be

construed against the delegation of power. As was said in the case of *Central Union Telephone Company, et al., v. Indianapolis Telephone Company*, an Indiana case, 126 N. E. 628, "all doubtful language in statutes delegating authority will be construed in favor of the retention of such power by the Legislature."

Under these criteria let us carefully examine the language of the Alocholic Beverage Control Act as a whole in order that we may determine what regulatory powers the Legislature thereby intended to delegate to the Board, and, especially, the limitations of such power, if any were [fol. 13] intended. Let us inquire as to what kind of regulations the Legislature intended the Board to promulgate pursuant to the Act.

In the title of the Act its purpose is defined to "legalize, regulate and control the manufacture, bottling, sale, distribution, transportation, handling, advertising, possession, drinking and use of alcohol. * * *"

Section 5 provides that all regulations of the Board must be *reasonable* and *not inconsistent with the Act itself or the general laws of the State*. Section 49-a, applying specifically to regulations of transportation of alcoholic beverages, provides that the Board may make regulations "as it may deem necessary to confine such transportation to legitimate purposes". In no other section of the Act is there any provision affecting the transportation of alcoholic beverages through the State. All other sections of the Act deal with the regulation, supervision and control of the manufacture, distribution and consumption of alcoholic beverages within the State.

There can be no doubt that the Legislature intended that the transportation of alcoholic beverages through the State should be regulated and controlled insofar that such transportation might result in violations of the laws of Virginia. It was not strictly necessary to enact any statute to accomplish such purpose. The mere fact that a citizen of North Carolina or any other state is engaged in transporting whiskey or any other article from one state to another through the State of Virginia does not in any case absolve him from obeying *all* of the laws of Virginia. He must obey all speed and other traffic regulations; he cannot violate any provision of the Alcoholic Beverage Control Act as to the illegal sale, distribution, possession or consumption of alcoholic beverages while within the boundaries of

Virginia; and, in short, he has no privileges, rights or immunities other than those accorded to our own citizens. There is no language contained in the entire Act indicating any intention on the part of the Legislature to enforce the laws of North Carolina, or any other State other than those of Virginia, nor can the language of the Act be construed to intend that the time and efforts of the State Officers and employees and the State's money be expended in ascertaining what the laws of other states may be and whether or not they might be violated by a person transporting alcoholic beverages through this State before he enters the State or after he has departed from it.

The sole intention of the Legislature was obviously to guard against the violation of the Virginia law by interstate transporters of alcoholic beverages while within the bound- [fol. 14] aries of the State. They had in mind that the operators of trucks containing shipments of alcoholic beverages on their journeys through the State might violate our laws if not properly supervised and policed while within the State and to guard against such violations they attempted to delegate to the Board purely administrative functions of policing such interstate shipments. In order to facilitate such policing of these shipments while within the boundaries of the State the Legislators in the Act of 1934 empowered the Board to make rules and regulations governing the same provided such rules should *be reasonable and not inconsistent with the Act itself.* In 1936 the Legislature added to the Act Section 49-a providing that the Board might make such regulations as it might deem necessary to confine such transportation to legitimate purposes. Any rule or regulation for any other purpose than the policing of such shipments would plainly be unauthorized, because it would not be consistent "with the Act itself". The term "legitimate purposes" contained in Section 49-a could not logically be construed to mean anything other than purposes lawful under the laws of the State of Virginia.

The provisions in Section 49-a that the Board may make such regulations as it may deem "necessary" even if we assume that the delegation of power is constitutional, could not be construed to mean that there is no limitation whatever upon the power, because an attempted delegation of this nature is plainly unconstitutional. Such language must be construed in connection with Section 5 to mean that the Board may make regulations reasonably designed to police

interstate shipments while within the boundaries of the State. Any rule or regulation promulgated by the Board not so designed for such purpose would be unauthorized.

Disregarding all questions as to whether or not such rules and regulations are in violation of Article I of the Constitution of the United States as placing an undue burden upon interstate commerce let us examine the regulations in question to ascertain whether or not they were expressly or impliedly delegated and authorized by the Act.

Applying the above tests we shall deal with the Regulations in the order set forth above.

(1) The requirement of a bond *with approved surety* before a person may transport goods through the State is, so far as we know, unprecedented. To require a person to give bond conditioned upon his compliance with laws before he is permitted to engage in a lawful enterprise over which the State may have no absolute control is, to say the least, un-
[fol. 15] usual. The only purpose would be to assure his payment of a penalty in the event that he was found guilty of a violation of the law or to convince the Board of his financial responsibility. It may be that the most trustworthy and law-abiding persons would not be in a position to give the bond.

The provision that the surety must be approved places in the Board the power to arbitrarily refuse any applicant the right to transport whiskey through this State.

Can it be said that this requirement is designed purely for the purpose of policing the shipment through the State? We think not. It would seem that the purpose is to grant or refuse the right to transport alcoholic beverages through the state at the will of the Board.

We, therefore, submit that this regulation was not authorized under the Act.

(2) The requirements that the route of the shipment through the State be designated and that such route be the most direct from the consignor to the consignee seem to us to be most unreasonable and arbitrary.

To require one to anticipate the exact route he is to travel while in the State is most exacting. He might not know the condition of the roads. If he should be compelled to spend the night in Virginia could he leave the highway to go to a hotel not situated thereon? Suppose floods destroy a bridge after he has entered the State. Such a regulation would re-

quire the carrier to anticipate the condition of every road over which he must travel, and not vary therefrom under any circumstances, regardless of the exigencies which might arise whether foreseeable or not.

Had the regulation required notice to the Board or any other agency that this truck would travel over certain roads at certain times in order that the shipment might be inspected, or that the shipment be inspected and checked before it entered the State and at the time of departure, they might be deemed reasonable exercises of the rule-making power. If the load were sealed prior to entering the State and inspected on departure, or any similar regulation to insure against illegal distribution of the shipment in this State, such a regulation might be reasonable and authorized under the Act.

The rules in question are not reasonably designed to properly accomplish the design of the Legislature, but seemingly for the pure purpose of burdening the carrier with inhibitions and useless restraints on his journey through the State.

[fol. 16] (3) The third particular in which these defendants are charged with the violation of the rules of the Alcoholic Beverage Control Board is that the consignee of this whiskey in North Carolina, as shown on the bill of lading, was a person who did not have a legal right to receive such alcoholic beverage at the point of destination. It will be observed that the rules require that the consignor must have a legal right to make the shipment and the consignee must have a legal right to receive the shipment at the point of destination. In other words, that the State of Virginia will inquire into the laws of other States and if, under those laws, an illegal act has been or may be committed in those States, the State of Virginia will charge that a crime has been committed against the laws of Virginia. Counsel can hardly conceive of a situation which would more clearly demonstrate the lengths to which the Alcoholic Beverage Control Board has gone in departing from what is believed to be the true intent and purpose of the Virginia Alcoholic Beverage Control Act. If this rule be valid the changing laws of any state in the Union to which alcoholic beverages may be consigned would become an issue in the trial of one charged with transporting such beverages through Virginia. And not only would the law of the State of destination be in issue but the law of the particular community, if

there happened to be local option in that State, would be the test of the commission of a crime in Virginia. The General Assembly of Virginia passes laws to apply within the confines of the Commonwealth and for the Alcoholic Beverage Control Board to say that these defendants, who have violated no law of the State of Virginia, are guilty of a crime punishable in the Courts of Virginia because they will deliver whiskey to some person outside of the State of Virginia who is not legally authorized to receive that whiskey at the point of destination again forcibly illustrates the unsoundness of these regulations. To uphold and enforce such a regulation would require a complete abnegation of the General Assembly of Virginia from its lawful prerogative to make laws for Virginia and to surrender that prerogative to the Alcoholic Beverage Control Board who, in turn, surrender it to the Legislature of some foreign state or, forsooth, to the law-making body of some county or hamlet to which a shipment of whiskey might be destined.

It is confidently submitted that in these respects these petitioners have violated no valid law of the State of Virginia.

[fol. 17] III

Are the rules and regulations promulgated by the Alcoholic Beverage Control Board violative of Article I, Section 8, Clause 3 of the Constitution of the United States in that they impose a burden upon interstate commerce?

Counsel have been careful in the discussion hereinbefore set out to refrain from any reference to the interstate commerce feature of this case, and irrespective of the view of the Court on the matters hereinbefore presented, it is confidently submitted that the regulations which these defendants are charged with violating are unconstitutional and invalid as constituting direct burdens on interstate commerce.

The first charge is the failure of these defendants to post bond as required by the rules. This question was directly passed on by this Court in the recent case of *Williams* v. *Commonwealth*, 169 Va. 857, where the Court, speaking through Mr. Justice Gregory, said—

"The provisions of the statute (Code, Section 4675 (49a)) requiring transportation permits and the posting of a bond for interstate shipments of liquor, not to be delivered or

used in Virginia, but only passing through the State in interstate commerce, destined for some other State, constitute direct burdens upon interstate commerce and are to that extent invalid. The failure of the plaintiff in error to have a transportation permit for his shipment and his failure to post the bond required did not constitute an infraction of any valid criminal law of the Commonwealth."

It is submitted that this pronouncement of the Supreme Court of Appeals of Virginia is still the law of the Commonwealth.

The second charge against these defendants is that the bill of lading of the shipment did not specify the route to be traveled in Virginia.

This question was directly passed on by this Court in the recent case of *Surles* v. *Commonwealth*, 172 Va. 573, where the Court, speaking through Mr. Justice Holt, said—

"The Williams case holds that transportation permits and the exaction of bonds in interstate shipments are burdens which the State cannot impose. And for the same reason a designation in advance of the route to be traveled is an exercise of power forbidden to the State."

[fol. 18] It is submitted that this pronouncement of the Supreme Court of Appeals of Virginia is still the law of the Commonwealth.

There can be no doubt that had this Court in the Surles and Williams cases, both *supra*, had before it the third regulation requiring a lawful consignor and consignee, it would have held the third regulation to be invalid and unconstitutional for the same reasons given in the opinions as to the validity of the regulations there in question. Surely there can be no question that the requirements of lawful consignors and consignees outside the boundaries of Virginia would fall into the same category with the rules there considered—to constitute a regulation of or a burden upon interstate commerce.

However, we anticipate that counsel for the defendants in error will seek comfort in the recent case decided by the Supreme Court of the United States, *Duckworth* v. *State of Arkansas*, 62 S. Ct. 311, 86 L. Ed. 261, wherein the constitutionality of an Act of the Arkansas Legislature was attacked

as unconstitutional. The Act required a permit to be obtained for the transportation of intoxicating liquors through the State. The court held that the Commerce Clause of the Constitution of the United States did not preclude a State from prescribing reasonable requirements governing such a transportation in order to insure that the liquor will not be diverted to delivery or use within the State. The Supreme Court was careful to limit the application of its opinion to a permit such as it had before it, saying:

"* * * *The present requirement of a permit is not shown to be more than a means of establishing the identity of those who are engaged in the transportation,* their route and point of destination, and affords *opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion,* in conformity to the permit. * * * The Arkansas statute does not conflict with any act of Congress. *It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state.* * * *

"What we have said is restricted to the statute as applied under the regulations in force at the time of petitioner's alleged offense. It will be time enough to deal with abuses of the permit system if and when they arise. * * *" (Italics ours.)

[fol. 19] How would the United States Supreme Court have decided the Williams and Surles cases, both *supra?* Could the court have said that the requirements of a bond *with approved surety*, an unchangeable itinerary routed on the bill of lading, and, according to the determination of an administrative board, a consignor and consignee lawfully entitled to transmit and receive the shipment without the boundaries of the State, were "reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the State"? We think not. We do not believe that such regulations can be so construed, and we earnestly submit that the said regulations create an unauthorized burden upon interstate commerce and if enforced against the petitioners constitute a violation of their rights under the Commerce Clause of the Constitution of the United States.

IV

Was the cancellation of the bond of Healton Miller by the Alcoholic Beverage Control Board a valid act under the power and authority conferred by the Alcoholic Beverage Control Act or the Rules and Regulations of the Board made pursuant thereto?

Assuming that the Act may have legally authorized the Board to make some kinds of rules and regulations affecting the mode and manner of transportation of interstate shipments of intoxicating liquors, there could certainly be no right conferred to act arbitrarily and without the promulgation of any rule, or regulation governing such act.

There is no express authority contained in the Act or the Regulations made by the Board authorizing it to cancel a bond once it has been properly posted and approved.

Can such power be implied from the Act or the Regulations? If so, the Board has the power to deny the right to transport liquor through this State to any person upon its whim or caprice. Any rumors which it might hear concerning a man's character or reputation might give it an excuse to cancel the bond. It would appear that the members of the Board acknowledge no limitation of the power. They could cancel the bond because of race, creed or color or any other reason. This court in *Assaid v. Roanoke, supra,* decided that such power could not be delegated by the Legislative authority even if such were the intention.

We, therefore, submit that there was no power, either express or implied, vested in the Board to cancel the bond of Healton Miller, and that at the time of petitioners' arrest [fol. 20] the bond was in full force and effect. Consequently there was no violation of the Regulations of the Board in this respect.

V

Was the cancellation of the bond a violation of petitioners' rights under the Commerce Clause of the Constitution of the United States?

It must be remembered that petitioners are not in the same position as producers, distributors and consumers of alcoholic beverages in Virginia. Their transportation of alcoholic beverages through the State is not a privilege existing as a result of a license or grant on the part of the State, but is an absolute *right* guaranteed and protected by the Constitution of the United States. Even though Vir-

ginia might prohibit the consumption or possession of liquor within its jurisdiction, yet it could not prohibit its transportation through the State.

There was no question as to the financial status of the corporate surety on the bond in this case. There was no assertion that the principal of the bond or his agents had ever violated the laws of Virginia or intended to do so in the future. The only reason given for the cancellation of the bond was that the principal had the reputation of being a bootlegger in North Carolina, and this without any hearing or notice to him.

The cancellation of the bond operated to prohibit any transportation of alcoholic beverages through the State by Healton Miller or his agents, and we submit that this act on the part of the Board violated his constitutional rights under the Commerce Clause of the Constitution of the United States.

Conclusion

It is submitted therefore that the judgment of the Trial Court was contrary to the law and the evidence and that these defendants have violated no valid law of the Commonwealth of Virginia.

Therefore, petitioners pray that a writ of error and *supersedeas* be awarded to them, that the aforesaid judgment of the Circuit Court of Rappahannock County be reversed and annulled, and that appropriate action be taken leading to the dismissal of the charges against these defendants.

[fol. 21] Notice that Counsel for Petitioners will present this petition, with the record attached, to Hon. George L. Browning, Associate Justice of the Supreme Court of Appeals of Virginia, at his office in the City of Richmond, on the 13th day of October, 1942, at two o'clock, has been given to Hon. George H. Davis, Jr., Commonwealth's Attorney for the County of Rappahannock, as evidenced by his acceptance thereof appended hereto.

In the event of a writ of error is granted, this petition will be adopted as a brief for the Plaintiffs in Error.

And Petitioners will ever pray, etc.

John Thomas Carter, Eugene Pearson Macomore,
by Counsel.

Weaver, Armstrong & Marshall, Perkins, Battle & Minor, p. q.

We, Aubrey G. Weaver and John S. Battle, the undersigned attorneys-at-law, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that, in our opinion, the judgments referred to in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

Aubrey G. Weaver, John S. Battle.

I hereby accept full, due and timely notice of the presentation of the foregoing petition, a true copy of which has been delivered to me, to Honorable George L. Browning, Associate Justice of the Supreme Court of Appeals of Virginia, at his office in the City of Richmond on the 13th day of October, 1942, at two o'clock P. M.

George H. Davis, Jr., Attorney for the Commonwealth for the County of Rappahannock, Virginia.

Received October 14, 1942.

G. L. B.

October 15, 1942. Writ of error and *supersedas* awarded by the Court. Bond $200.

M. B. W.

[fol. 22] APPENDIX TO PETITION

Section 5 of Alcoholic Beverage Control Act of 1936 Michie's Code—

"Section 4675 (5). *Power to make regulations; how published; effect thereof.*—(a) The board may from time to time make such reasonable regulations, not inconsistent with this act, nor the general laws of the State, as the board shall deem necessary to carry out the purposes, and provisions of this act and to prevent the illegal manufacture, bottling, sale, distribution and transportation of alcoholic beverages, or any one or more of such illegal acts and from time to time alter, repeal, or amend such regulations or any of them. Such regulations shall be published at least once in some newspaper published in the city of Richmond and in any other manner which the board may deem advisable, and upon being so published shall have the force and effect of law. The board shall certify to the clerks of all circuit courts and city courts of record having criminal jurisdic-

tion copies of all regulations adopted by the board; such clerks shall keep on file for public inspection all such regulations certified to them by the board.

"(b) Nothing in this act contained shall require such regulations to be uniform in their application.

"(c) Justices and courts shall take judicial notice of the regulations of the board made, published and filed in accordance with the provisions of this act. (*Id.*, p. 105; 1936, p. 419.)"

Section 49-a of Alcoholic Beverage Control Act of 1936 Michie's Code—

"Section 4675 (49a). *Transportation; transportation permits; penalties.*—The transportation of alcoholic beverages, other than wine and beer, purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia, in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this [fol. 23] State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act within, into or through Virginia in quantities in excess of one gallon, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675(62). (1936, p. 434.)"

Regulations of Alcoholic Beverage Control Board, Section 42—

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control

Act, As Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and/or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

[fol. 24] Regulations of Alcoholic Beverage Control Board, Section 44—

"Section 44. Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment, signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or other memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

[fol. 25] In Trial Justice Court of Rappahannock County

Criminal Warrant

The Commonwealth of Virginia,
County of Rappahannock, to-wit:

To Any Police Officer, Greeting:

Whereas, J. W. Dulaney, A B C Investigator has this day made complaint and information on oath before me, the undersigned, M. A. Compton, Justice for the County of Rappahannock that John Thomas Carter & Eugene Pearson Macemore, heretofore, to-wit: on the 20th day of May, 1942, within the said County of Rappahannock, did unlawfully violate the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia, and *Section* 42 and 44 of a regulation of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940: In that you did transport more than one gallon of alcoholic beverages, namely: 56 cases, containing 168 gallons of whiskey, from a point in the State of Maryland, within and into the State of Virginia and in Rappahannock County, Virginia, without having posted with the Virginia Alcoholic Beverage Control Board a bond with approved surety, as required by law; and

Further, that the bill of lading or other memorandum of shipment did not specify the route to be traveled by such vehicle while in Virginia; and

Further, the consignee shown on the bill of lading or other memorandum of shipment was a person who did not have a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment, namely; R. M. Williard, T/A Eagle Distilling Company, Route 1, Thomasville, North Carolina, against the peace and dignity of the Commonwealth of Virginia.

These Are Therefore, in the name of the Commonwealth, to command you forthwith to apprehend and bring before the Trial Justice of the said County of Rappahannock, the said John Thomas Carter and Eugene Pearson Macemore to answer the said complaint and to be further dealt with according to law.

And you are further required to summon R. E. Wood, J. M. Lillard, J. W. Dulaney and E. C. Hoberoft to appear at [fol. 26] the same time and place and give evidence on the trial or examination of this warrant.

Given under my hand and seal this the 25 day of May, 1942.

M. A. Compton, J. P. (Seal.)

In Trial Justice Court of Rappahannock County

Judgment

The above named John Thomas Carter & Eugene Pearson Macemore were this day brought before me in the Trial Justice Court of Rappahannock County, and the above warrant was tried by me in the presence of said accused, upon their plea of not guilty, and it is my judgment that the said defendants are guilty of the within charges and I fix their punishment at a fine of Fifty Dollars and costs. Said defendants agreed to be tried jointly.

And thereupon the said accused was let on bail.

Given under my hand this the 6th day of June, 1942.

Geo. W. Settle, Trial Justice.

Order Allowing Appeal to Circuit Court

On motion of the said Defendants an appeal is allowed to them from within judgment to the Circuit Court of Rappahannock Co. and they were thereupon let to Bail.

Given under my hand this the 6th day of June, 1942.

Geo. W. Settle, Trial Justice.

In Trial Justice Court of Rappahannock County

Bail Bond

Commonwealth of Virginia,
County of Rappahannock, to-wit:

I, Geo. W. Settle, T. J. for said County of Rappk., Virginia do hereby certify that John Thomas Carter & Eugene Pearson Macemore have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Two Hundred Dollars ($200.00), of their respective goods and chattels, lands and tenements to be made and levied: and do hereby post in the hands of Jas. M. Settle, Clerk of Circuit Court the sum of $200.00 in cash as additional security.

Yet upon this condition that if the said John Thomas Carter & Eugene Pearson Macemore shall personally appear [fol. 27] before the Circuit Court of the County of Rappahannock, Virginia, on the 13th day of July, 1942, then and there to answer the Commonwealth concerning said charge in this warrant, and shall not depart thence without leave of said Court, then this recognizance to be void; otherwise, to remain in full force and virtue.

John T. Carter, Eugene Macemore. (Seal.)

Given under my hand and seal this 6th day of June, 1942.

Geo. W. Settle. (Seal.)

IN TRIAL JUSTICE COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

Warrant for JOHN THOMAS CARTER, EUGENE PEARSON MACEMORE

RETURN OF SHERIFF

I executed the within warrant by arresting the within named John T. Carter & Eugene P. Macemore on the 6th day of June, 1942.

J. M. Lillard, Sheriff.

[Bill of Costs in Trial Justice Court omitted in printing.]

[fol. 28] IN THE TRIAL JUSTICE COURT OF THE COUNTY OF RAPPAHANNOCK

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE

ORDER FOR RETURN OF PORTION OF BAIL BOND COLLATERAL

On this 6th day of June, 1942, the above case having been heard and the bail bond for the appearance of the defendants before the Circuit Court of Rappahannock County, Virginia, on the 13th day of July, 1942, having been set in the penalty of Two Hundred Dollars ($200.00), it is ordered that J. M. Settle, Clerk of the Circuit Court of Rappahannock County, do pay over to the said defendants the sum of One Thousand Four Hundred Dollars, ($1,400), held by him as collateral for the bail bonds returnable this day, retaining the sum of Two Hundred Dollars ($200.00) as collateral for the bonds issued this day as aforesaid.

Enter:

Geo. W. Settle, Trial Justice.

In Trial Justice Court of Rappahannock County

Bail Bond

Commonwealth of Virginia,
County of Rappahannock, to-wit:

Know All Men by These Present That I John T. Carter am held and firmly bound under the Commonwealth of Virginia in the just and full sum of Eight Hundred Dollars ($800.00) to the payment whereof well and truly to be made I bind myself, my heirs and personal representatives, firmly by these presents; and as additional security for this bond do hereby post in the hands of the Clerk of the [fol. 29] Circuit Court of Rappahannock County, Virginia, the sum of Eight Hundred Dollars ($800.00) in cash, to be forfeited to the Commonwealth or returned upon the conditions hereinafter stated:

And I hereby waive the benefit of my homestead exemption as to this obligation.

Sealed with my seal and dated this 22nd day of May, 1942.

The condition of the above obligation is such that if the above bound John T. Carter shall personally appear before the Trial Justice Court of said County on the 6th day of June, 1942; as well as at any other time or times to which the proceedings in connection with the charge herein specified may be continued or further heard, then and there answer to the Commonwealth of Virginia, for and concerning a certain crime by him committed as described in the warrant hereto attached and shall not depart thence without leave of said Court, this his recognizance to remain in full force and effect until said charge shall have been finally disposed of or until it shall have been declared void by order of a Court of competent jurisdiction, then this obligation shall be void; otherwise to remain in full force and effect.

John T. Carter. (Seal.)

Signed, sealed and acknowledged by each of the above named, obligors before me, at the Clerk's Office of said County, this 22nd day of May, 1942.
Jas. M. Settle, Clerk Ct. Ct. Rapp'k. Co., Va.

IN TRIAL JUSTICE COURT OF RAPPAHANNOCK COUNTY

BAIL BOND

COMMONWEALTH OF VIRGINIA,
County of Rappahannock, to-wit:

Know all men by these *present*, that I Eugene Pearson Macemore, principal, and John T. Carter, surety, are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of Eight Hundred Dollars ($800.00) to the payment whereof well and truly to be made we bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these *present;* and as additional security for this bond do hereby post in the hands of the Clerk of the Circuit Court of Rappahannock County, Virginia, the sum of $800.00 cash, to be forfeited to the Commonwealth or returned upon the condition hereinafter stated. [fol. 30] And we hereby waive the benefit of our homestead exemptions as to this obligation.

Sealed with our seals and dated this 21st day of May, 1942.

The condition of the above obligation is such that if the above bound Eugene Pearson Macemore shall personally appear before the Trial Justice Court of said County on the 6th day of June, 1942, as well as at any other time or times to which the proceedings in connection with the charge herein specified may be continued or further heard, then and there answer to the Commonwealth of Virginia, for and concerning a certain crime by him committed as described in the warrant hereto attached and shall not depart thence without leave of said Court, this his recognizance to remain in full force and effect until said charge shall have been finally disposed of or until it shall have been declared void by order of a Court of competent jurisdiction, then this obligation shall be void; otherwise to remain in full force and effect.

Eugene Macemore, John T. Carter. (Seal.)

Signed, sealed and acknowledged by each of the above named obligors before me, at the Clerk's Office of said County, this 21st day of May, 1942.
B. M. Miller, Subt. T. J.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE

PLEAS OF NOT GUILTY AND WAIVER OF JURY TRIAL

On this 13th day of July, 1942, came the said John Thomas Carter and Eugene Pearson Macemore by their attorneys, and George H. Davis, Jr., who prosecutes for the Commonwealth in this behalf; and,

Whereupon said defendants by their attorneys entered their pleas of not guilty to the charges contained in the warrant issued in this case.

[fol. 31] Whereupon the said defendants by their said attorneys in open court waived trial by jury and filed a written stipulation of the facts upon which the charges in said warrant are based, which statement was subscribed by the attorneys for the defendants and for the Commonwealth and it was agreed that the same shall constitute the facts in this case.

Whereupon the Court took this case under advisement and granted leave to attorneys for both the Commonwealth and the defendants to file memorandum of authorities on the various issues involved in this case within 20 days from the date of this order.

And this case is continued.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Defendants

JUDGMENT—September 14, 1942

Upon An Appeal Warrant

This day came again the Commonwealth by her attorney, and came also the defendants, by counsel; whereupon the

Court being now fully advised of its opinion in this case, doth adjudge and order that each of said defendants be fined the sum of $50.00 and the costs of this prosecution; thereupon the defendants, by counsel noted an exception to the ruling of the court; it is further ordered that the bail in this case be continued in full force and effect.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Defendants

[fol. 32] ORDER GRANTING STAY

On this 28th day of September, 1942, came the defendants by their attorneys and moved the Court for a stay of the execution of the judgment of the Court in this case entered against the defendants on the ground that the defendants intend to apply to the Supreme Court of Appeals of Virginia for a writ of error. And came also the Commonwealth by its attorney.

There being no objections or exceptions to said motion, the same is sustained and it is ordered that execution of the judgment against the defendants entered in this case on the 14th day of September, 1942, be and the same is hereby stayed for a period of ninety days from the date of this order.

The bail bond heretofore entered into by the defendants shall continue in full force and effect and the same is continued until the further order of this court.

J. R. H. Alexander, Judge.

Seen & Approved:

George H. Davis, Jr., Commonwealth Atty.

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

COMMONWEALTH OF VIRGINIA

v.

JOHN THOMAS CARTER and EUGENE THOMAS MACEMORE, Defendants

Bill of Exceptions

STIPULATION OF FACTS

Be it remembered that on the trial of this case it was stipulated between the Commonwealth and the defendants that the facts of this case were as follows:

1. On May 20, 1942, John Thomas Carter and Eugene Pearson Macemore, the two above named defendants, did receive from the Dorsey Wholesale Liquor Company, Inc., Dorsey, Maryland, who is a duly licensed wholesale establishment, at the establishment of such concern in Dorsey, [fol. 33] Maryland, fifty-six (56) cases of assorted whiskies, containing one hundred sixty-eight gallons of whiskey, for the account of R. M. Williard, Trading as Eagle Distilling Company, Route No. 1, Thomasville, North Carolina.

2. That in Maryland, this whiskey was placed upon a 1938 Ford Truck, bearing North Carolina License No. 157 B/2 237, which said truck was being jointly operated by Eugene Pearson Macemore, of Jonesville, North Carolina, and John Thomas Carter, of Thomasville, North Carolina.

3. The bill of lading showed the whiskey to have been consigned to R. M. Williard T/A Eagle Distilling Company, Route 1, Thomasville, North Carolina, but contained no routeing for the truck to follow while in Virginia.

4. That this truck left the State of Maryland and proceeded into the State of Virginia, and was in the act of passing through the State of Virginia, destined to a point in North Carolina, when apprehended in Rappahannock County, Virginia.

5. That R. M. Williard, Trading as Eagle Distilling Company, Route No. 1, Thomasville, North Carolina, who was the consignee on the bill of lading of this whiskey, according to the laws of the State of North Carolina, could not lawfully receive this shipment at its point of destination.

6. That the truck within which this whiskey was being transported was registered in the name of Healton Miller of Winston-Salem, North Carolina, who on March 26, 1942, posted a bond with approved surety, as required by law, with the Virginia Alcoholic Beverage Control Board, and the Board did on that day issue a certificate of evidence that such bond had been posted, copies of the bond and certificate being made a part hereof as Exhibits A and B respectively. That on May 1, 1942, the Virginia Alcoholic Beverage Control Board did notify Healton Miller of the cancellation of said bond and demanded the return of the certificate upon information that Healton Miller had the reputation of being a bootlegger in North Carolina, without any evidence of a violation of the laws of the State of Virginia.

7. That this whiskey was seized and turned over to the proper officer of the Court, in accordance with law, and the defendants, John Thomas Carter and Eugene Pearson Macemore were arrested and charges with the violation of the law, as set forth in the warrant.

[fol. 34] EXHIBIT "A"

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

ALCOHOLIC BEVERAGE CONTROL BOARD, RICHMOND, VIRGINIA

Know all men by these presents, That I, Healton Miller, of 1035 Albert Street, Winston-Salem, North Carolina, Principal, and Hartford Accident and Indemnity Company, Surety, are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of One Thousand Dollars, to the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents;

Whereas, the above bound principal desires to transport alcoholic beverages within, into or through the State of Virginia, in accordance with the regulations of the Virginia Alcoholic Beverage Control Board adopted pursuant to the acts of the General Assembly of Virginia;

Now therefore:

The condition of the above obligation is such that, in the event the said carrier shall engage in the transportation and/or delivery of alcoholic beverages within, into or through the State of Virginia, in a manner in conformity with the laws of the Commonwealth of Virginia, and the regulations of the Virginia Alcoholic Beverage Control Board, then the above obligation shall be null and void; otherwise, it shall remain in full force, virtue and effect.

It is understood that this bond may be cancelled by the Surety upon giving thirty days' written notice to the Virginia Alcoholic Beverage Control Board at Richmond, Virginia.

In Witness Whereof, the said Healton Miller, Principal, has signed and sealed these presents and the Surety has caused these *present* to be executed by Robert I. Boswell, [fol. 35] its duly authorized Attorney-in-Fact, this 26th day of March, 1942.

Healton Miller, Hartford Accident & Indemnity Co.
Surety. By Robert I. Boswell, Attorney-in-fact.
(Seal.)

Countersigned: Robert I. Boswell, Resident Virginia Agent.

EXHIBIT "B"

(To be posted in cab of truck)

COMMONWEALTH OF VIRGINIA

Department of Alcoholic Beverage Control
Virginia Alcoholic Beverage Control Board
Richmond, Virginia

No. 9484

EVIDENCE OF BOND.

Truck No. 1 Ford *Carrier No. 324*

This is to Certify That Healton Miller of Winston-Salem, North Carolina, has filed with this Board, bond as required under the regulations governing the transportation of alco-

holic beverages within, into or through the State of Virginia in quantities in excess of One (1) gallon.

Virginia Alcoholic Beverage Control Board. By O. W. McClure, Traffic Manager, Division of Merchandising.

Motor No. 18-444330#.
Expires: 3-26-43.

[fol. 36] (This Evidence of Bond must be returned to the Virginia Alcoholic Beverage Control Board if and whenever called for.)

Said stipulated facts are hereby made a part of the record in this case and shall be enrolled as a part of the record thereof.

MOTION TO STRIKE EVIDENCE, ETC.

Be it further remembered that after the submission of said stipulated facts the said defendants by their attorneys came in open court in the presence of the attorney for the Commonwealth and move the Court to strike out all of the evidence and to dismiss the warrant in this case on the grounds that the acts of the defendants as charged in the said warrant and set forth in said stipulation of facts do not constitute a crime against the Commonwealth because the regulations and Acts set forth in the warrant charging the defendants with violating the same are void, inoperative and of no effect in the following particulars:

1. That under the provisions of Section 5 and Section 49-a of the Alcoholic Beverage Control Act, Chapter 94 of Acts of the General Assembly of Virginia of 1934, as amended, Virginia Code Section 4675 (49-a) there was no authority delegated to make such regulations as Sections 42 and 44 of a regulation of the Virginia Alcoholic Beverage Control Board, known as Order Number A-1, adopted August 30, 1940, in that such regulations were not within the scope of the powers delegated to said Board under said Act.

2. That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was a discriminatory action and was unlawful and without authority under the provisions of said Act and said regulations.

3. That said Act is unconstitutional insofar that it confers upon said Board the power to make said regulations, in that it violates Article III of the Constitution of Virginia in attempting to delegate to said Board purely legislative powers and functions.

4. That said Act and said regulations are unconstitutional in that they violate Article I, Section 8, clause 3 of the Constitution of the United States of regulating commerce between two States and/or imposing a burden upon interstate commerce.

5. That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was unlawful and violative of the defendants' rights under the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States. [fol. 37] And upon consideration of said motions the Court overruled and denied the same, to which ruling the defendants excepted on the aforesaid grounds stated.

MOTION FOR NEW TRIAL.

Be it further remembered that after the judgment of the court of the guilt of the accused, the defendants came in open court in the presence of the attorney for the Commonwealth and moved the court for a new trial on the identical grounds assigned for their motions to strike out all of the evidence and to dismiss the warrant as hereinbefore set forth in full and upon consideration whereof said motion was overruled and denied, to which ruling of the Court the defendants excepted.

To all of the aforesaid rulings of the court the defendants except and pray that this bill of exceptions may be signed, sealed and enrolled as a part of the record, which is done accordingly within the time prescribed by law, after it appeared in writing that the Commonwealth had been given reasonable notice of the time and place of presenting the same, this 28th day of September, 1942.

J. R. H. Alexander, Judge of the Twenty-Sixth Judicial Circuit. (Seal.)

CLERK'S CERTIFICATE

I, James M. Settle, Clerk of the Circuit Court of Rappahannock County, Virginia, do hereby certify that the foregoing is a correct copy of the record in the cause of Common-

wealth of Virginia *v.* John Thomas Carter and Eugene Pearson Macemore, Defendants, copied pursuant to the application of said defendants by counsel made to me on the 28th day of September, 1942, at two o'clock P. M. at my office in Washington, Virginia.

And I do further certify that a notice of the intention of the said defendants to apply for a transcript of the record in said cause was duly given to the Commonwealth through her Attorney, George H. Davis, Jr.

James M. Settle, Clerk of the Circuit Court of Rappahannock County, Virginia.

A Copy—Teste:

M. B. Watts, C. C.

[fol. 38] In Supreme Court of Appeals of Virginia

Present: Campbell, C. J., Hudgins, Gregory, Browning, Eggleston and Spratley, JJ.

Record No. 2668

John T. Carter and E. P. Macemore

v.

Commonwealth of Virginia

From the Circuit Court of Rappahannock County; J. R. H. Alexander, Judge.

Opinion by Justice C. Vernon Spratley—March 8, 1943

This is a companion case to *Earl Dickerson, W. O. Page, and one 1939 Ford Motor truck etc. v. the Commonwealth of Virginia*, decided this day.

The evidence in the two cases is somewhat different, but the principal assignments of error are based upon the same grounds. This case, however, has certain additional assignments of error based upon the specific offenses alleged against the appellants.

John T. Carter and E. P. Macemore were on September 14, 1942, jointly convicted of unlawfully transporting whiskey within, into and through Virginia. The specific charges against them were that the bill of lading for their

[fol. 39] whiskey shipment showed that it was being transported to a person who did not have a legal right to receive it at the point of destination shown thereon, as required by section 44 of the regulations of the A. B. C. Board of Virginia; that the bill of lading did not specify the route to be travelled by their truck in Virginia, as required by section 42 of the regulations; and that the appellants had posted no bond.

The case was tried by the court without the intervention of a jury upon an agreed stipulation of facts. The facts may be briefly stated as follows:

On May 20, 1942, the appellants received from a wholesale liquor dealer in Dorsey, Maryland, a shipment of 168 gallons of whiskey consigned to R. M. Williard at Thomasville, North Carolina. The whiskey was loaded on a truck, and immediately driven into Virginia by the appellants. Carter and Macemore said they intended to transport it through Virginia into North Carolina. They were apprehended and arrested in Rappahannock County, Virginia. They produced a bill of lading showing the correct amount of whiskey contained in the shipment, and disclosing the consignee to be a resident of North Carolina. Under the laws of North Carolina, the consignee could not lawfully [fol. 40] receive the whiskey at its destination. The bill of lading specified no route for the truck to follow while in Virginia.

The truck was registered in the name of Healton Miller, a resident of North Carolina, who had posted, on March 26, 1942, a bond as required by section 42 of the Regulations of the Virginia Alcoholic Beverage Control Board; but the Board had notified Miller on May 1, 1942, of the cancellation of the bond and demanded the return of the certificate issued thereon. The bond had been cancelled upon information that Miller had the reputation of being a bootlegger in North Carolina. There was no evidence that Miller had ever violated the laws of Virginia.

Virginia Code, 1942, (Michie) section 4675 (5) and (49a) and section 44 of the Regulations of the Virginia Alcoholic Beverage Control Board have been set out in the companion case. Section 42 of the said regulations reads as follows:

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act,

as Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into, or through the State of Virginia, such [fol. 41] person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and/or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

It is here contended that the Virginia Alcoholic Beverage Control Act is unconstitutional, in that (1) the legisla- [fol. 42] ture did not have the power to delegate to the Alcoholic Beverage Control Board the right to adopt regulations having the force and effect of law; (2) that the Board did not have the authority to adopt sections 42 and 44 of its Regulations; (3) that the above sections are unconstitutional, in that they violate Article I, section 8, clause 3 of the Constitution of the United States by imposing a burden upon interstate commerce; and (4) that the cancellation of the bond of Healton Miller was not a valid action under the power conferred upon the Board and was violative of the rights of the appellants under the commerce clause of the Federal Constitution.

What we have said in *Earl Dickerson, W. O. Page, and one 1939 Ford truck, etc.* v. *Commonwealth, supra,* applies and controls here upon similar questions raised by the appellants.

The bond required under section 42 of the regulations is for the purpose of insuring the fitness and integrity of the carrier of the liquor. It is evidence of his responsibility and a guaranty of lawful transportation. It confines the transportation to a channel deemed trustworthy.

The requirement that the bill of lading or other memorandum of shipment shall designate the route to be travelled [fol. 43] in Virginia enables agents of the Board and the State police to inspect the shipment in transit, to keep a watch over its movements, and to discourage and prevent its unlawful delivery or distribution within the State. It is but an incident of local regulation over a subject which, if left to unrestrained movement, has a tendency to affect the public safety and welfare.

Both requirements are reasonable aids in preventing the unlawful distribution and sale of alcoholic beverages in the State. They are consistent with the provisions and purpose of the Alcoholic Beverage Control Act to regulate and control the liquor traffic and hold it within confined limits. Neither requirement forbids or precludes the lawful transportation of ardent spirits in interstate commerce. Each tends to make regulation effective.

See *Ziffrin* v. *Reeves*, 308 U. S. 132, 84 L. Ed. 128, where a State statute limiting transportation to specified common carriers was upheld, and *Duckworth* v. *Arkansas*, 314 U. S. 389, 86 L. Ed. 294, 138 A. L. R. 1144, where a statute requiring a permit for transporting liquor was declared valid.

Miller, the only person who had the right to challenge the cancellation of his bond, is not a party to this proceeding. There is no evidence that he protested the action of the Board. It does not appear from the record what connection [fol. 44] he had with the transportation of the whiskey, nor whether Carter and Macemore were his agents. We are not told whether the latter were using the truck with or without Miller's knowledge, or what action, if any, he may have taken to protect his property rights in the truck.

The bond is conditioned that the carrier will not engage in the unlawful transportation of alcoholic spirits within, into or through the State of Virginia. Evidence of its posting with the Board constituted a permit—a permit to lawfully transport. Cancelled or uncancelled, it gives no one a permit for unlawful transportation.

Whether or not the appellants might have given an acceptable bond for interstate transportation through Vir-

ginia is not an issue here. If such a bond had been given, it would have permitted lawful transportation, but it would have afforded no defense to an unlawful carriage.

The requirement for the posting of a bond is a regulation of a police nature. The Board having the authority to require the bond, under the police powers conferred upon it by the A. B. C. Act, had the right to cancel it with or without notice under the same power if, in the exercise of a [fol. 45] reasonable discretion, it was satisfied that it was being used or about to be used against the public safety and welfare.

It is not to be presumed that the authority of the Board will be arbitrarily used; but in the event that it is abused, a person feeling himself aggrieved may seek judicial relief in the courts.

In support of their contention that the regulations of the Board impose a burden upon interstate commerce, the appellants cite the recent case of *Barnett* v. *State*, — Ala. —, 9 So. (2d) 267. The Alabama court did not have before it for decision statutes or regulations involving the questions here raised. In that case, it was held that the Twenty-first Amendment to the Federal Constitution did not authorize the seizure and condemnation of liquors and transporting vehicles under existing Alabama statutes, where such liquors were being transported through Alabama to another State for disposition in violation of the laws of the latter State. In the case before us the prosecution of the appellants is based upon specific statutes of Virginia.

The judgment of the trial court is affirmed.

Affirmed.

[fol. 46] In Supreme Court of Appeals of Virginia

Record No. 2668

John Thomas Carter and Eugene Pearson Macemore, Plaintiffs in error,

against

Commonwealth of Virginia, Defendant in error

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Rappahannock county on the 14th day of September, 1942.

JUDGMENT—March 8, 1943

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiffs in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said circuit court.

[fol. 47] Clerk's Certificate to record omitted in printing.

[fol. 48] IN THE SUPREME COURT OF THE UNITED STATES

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE, Appellants

versus

THE COMMONWEALTH OF VIRGINIA, Appellee

PETITON FOR APPEAL

To the Honorable, the Chief Justice of the United States and the Justices of the Supreme Court of the United States:

Your petitioners, John Thomas Carter and Eugene Pearson Macemore, respectfully represent:

1

Having been advised by the Honorable Chief Justice of the Supreme Court of Appeals of Virginia that he has adopted an invariable rule to the effect that he will refuse all applications for appeal to the Supreme Court of the United States from the final judgments or decrees of that court, the petitioners have not made application for appeal to the said Chief Justice in this case.

2

Petitioners were the appellants in a cause in the Supreme Court of Appeals of Virginia, the Court of last resort

[fol. 49] of Virginia, under the style of John Thomas Carter and Eugene Pearson Macemore versus The Commonwealth of Virginia, Record Number 2668, wherein a final judgment and opinion was rendered adversely to the petitioners on the 8th day of March, 1943.

3

The appeal in said cause was from a judgment of the Circuit Court of Rappahannock County, Virginia, imposing fines of Fifty Dollars ($50.00) and the cost of prosecution upon each of the petitioners for the violations of the provisions of Section 49-a of the Alcoholic Beverage Control Act of Virginia, (Acts of 1936 page 434, Michie's Virginia Code of 1942, Section 4675 (49-a) and Sections 42 and 44 of the Regulations of the Virginia Alcoholic Beverage Control Board, known as Order No. A-1, adopted August 30, 1940), pursuant to the powers delegated under the said Act. The Act delegated to the said Board the power to adopt regulations having the force and effect of law governing the transportation of alcoholic beverages through Virginia in quantities in excess of one gallon. These regulations provide in effect as follows:

Section 42. No person shall transport any alcoholic beverages through the State of Virginia until he shall have posted with the Board bond with approved surety in the penalty of One Thousand Dollars ($1000.00) upon condition that he will not unlawfully transport alcohol beverages through the State, and evidence of the bond shall accompany the alcoholic beverages at all times during transportation.

[fol. 50] Section 44.

(a) There shall accompany such shipments a bill of lading showing an exact description of the alcoholic beverages being transported, the name and address of the consignor and consignee, the route to be traveled by the vehicle containing the shipment while in Virginia, which route must be the most direct route from the consignor's place of business to the consignee.

(b) The vehicle transporting such beverages shall not vary from the route specified as aforesaid.

(c) The name of the consignor shall be that of the true consignor, and he shall be a person who has a legal

right to make such shipment, and the name of the consignee shall be the true consignee and the consignee must have a legal right to receive such beverages at the point of destination shown on the bill of lading.

4

That on appeal from such judgment by the petitioners to the said Supreme Court of Appeals of Virginia, such Court being the highest Court of Law and Equity in such State in which a decision of the matters in controversy could be had, the judgment appealed from was in all effects affirmed by the final judgment entered in the Supreme Court of Appeals of Virginia on the 8th day of March, 1943.

5

That there is error in the final judgment and record of proceedings in this cause in the said Supreme Court [fol. 51] of Appeals of Virginia whereby petitioners are aggrieved in that in the decision and judgment of said Court there was drawn in question the validity of a statute and regulations promulgated pursuant thereto as set forth in paragraph 2 of this petition, on the ground of their being repugnant to or in contravention of Article I, Section 8, paragraph 3 of the Constitution of the United States and the decision and judgment of the said Supreme Court of Appeals of Virginia was in favor of the validity of said statute and regulations.

Wherefore, petitioners pray for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of Appeals of Virginia against the petitioners to the Supreme Court of the United States, in order that the said decision and judgment of the Supreme Court of Appeals of Virginia may be examined and reversed, and a judgment rendered in favor of petitioners and for costs and further pray that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Appeals of Virginia, may be sent to the Supreme Court of the United States as provided by law.

Petitioners further pray that this court may enter its order fixing the amount of the bond required for said appeal as required by law.

The errors upon which petitioners claim to be entitled to an appeal are those hereinabove indicated and which

are more fully set out in the assignment of errors filed herewith.

[fol. 52] Respectfully submitted this 25th day of May, 1943.

R. E. Joyce, John S. Battle, Aubrey G. Weaver, of Counsel for the Petitioners-Appellants.

R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia; Weaver, Armstrong and Marshall, Front Royal, Virginia; Counsel for Petitioners-Appellants.

ORDER ALLOWING APPEAL

Appeal allowed.

Bond for $250 to be posted.

Harlan F. Stone, Chief Justice.

May 26, 1943.

[fol. 53] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

Now come John Thomas Carter and Eugene Pearson Macemore, the appellants above named, and respectfully submit that in the record, proceedings, opinion and decree of the Supreme Court of Appeals of Virginia in the cause mentioned in the petition herewith presented there is manifest error in this, to-wit:

1

The Supreme Court of Appeals of Virginia erred in affirming the judgment of the Circuit Court of Rappahannock County, Virginia, which judgment imposed upon each of the appellants a fine of Fifty Dollars and costs.

[fol. 54]

2

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to trans-

port through the State of Virginia any alcoholic beverages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, in so far as said statute sanctions the requirement of Regulation 44-a (Order No. A-1, August 30, 1940) prescribed by said Board, that every shipment of such alcoholic beverages through the State of Virginia must be accompanied by a bill of lading, or other memorandum of shipment, specifying the route to be traveled, which must be the most direct route from the Consignor's place of business to the consignee's place of business, the said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States.

3

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to transport through the State of Virginia any alcoholic bever- [fol. 55] ages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, in so far as said statute sanctions the requirement of Regulation 42 (Order No. A-1, August 30, 1940) prescribed by said Board, that every shipment of such alcoholic beverages through the State of Virginia shall be accompanied by a bill of lading, or other memorandum of shipment, which discloses the name of the consignee, who shall be a person who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment, the said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States.

4

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of

Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to transport through the State of Virginia any alcoholic beverages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, [fol. 56] in so far as said statute sanctions the requirement of Regulation 44a (Order No. A-1, August 30, 1940) prescribed by said Board, that every person transporting such alcoholic beverages through the State of Virginia shall post with the Alcoholic Beverage Control Board bond with approved surety payable to the Commonwealth of Virginia in the sum of One Thousand Dollars, conditioned that such person will not unlawfully transport alcoholic beverages through the State of Virginia, the said statute is repugnant to and in conflict with Article I, Section 8, paragraph 3, of the Constitution of the United States.

5

The Supreme Court of Appeals of Virginia erred in holding Section 49-a of the Alcoholic Beverage Control Act of Virginia, Acts 1936, p. 434 (Michie's Virginia Code of 1942, Section 4675 (49-a)) which makes it an offense to transport through the State of Virginia any alcoholic beverages in excess of one gallon, other than alcoholic beverages which may be manufactured and sold without any license under the provisions of that Act, except in accordance with regulations of the Virginia Alcoholic Beverage Control Board, to be valid as against the contention that, in so far as the said statute sanctions the provisions of Regulation 42 (Order No. A-1, August 30, 1940) which authorizes said Board to cancel the bond posted by Healton Miller for the Ford Truck used by the Appellants in the transportation of the liquor alleged to be contraband upon the information that Healton Miller had the reputation of being a bootlegger in North Carolina and without evidence [fol. 57] of any violation of the laws of the State of Virginia, the said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.

6

The Supreme Court of Appeals of Virginia erred in holding that the Commonwealth of Virginia has the authority and power, by virtue of the provisions of Section 49a of the Virginia Alcoholic Beverage Control Act, Acts 1936, p. 484 (Michie's Virginia Code of 1942, Section 4675 (49a) and of Regulations 42 and 44 (Order No. A-1, August 30, 1940) promulgated by the Virginia Alcoholic Beverage Control Board pursuant to the authority of said Act, to regulate, control or unduly burden a shipment of alcoholic beverages originating in Maryland and passing through Virginia enroute to its desination in North Carolina where there is no intention to sell, dispose of or in any manner use any portion of the shipment within the State of Virginia nor any intention to violate any of the laws of Virginia. The said Act and Regulations are not reasonably designed to police the shipment or to prevent the violation of the laws of Virginia or the diversion of the said beverages into channels within the State, and hence the same are repugnant to and in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.

7

The Supreme Court of Appeals of Virginia erred in holding the said statute of the Commonwealth of Virginia and said regulations of the Virginia Alcoholic Beverage Control Board promulgated pursuant to the provisions [fol. 58] thereof to be valid as applied to the shipment of alcoholic beverages herein involved. This was error because the Congress of the United States has exclusive power to regulate interstate commerce, the several states having only such powers in this respect as are granted them by Congress, and the power to regulate a shipment of alcoholic beverages merely passing through the State has not been granted to the State, either by amendment to the Constitution of the United States or Act of Congress, and the exercise of the power purported to be granted under the said statute and regulations serves to create an undue burden upon interstate commerce.

For which errors the appellants above named, John Thomas Carter and Eugene Pearson Macemore, pray that said judgment of the Supreme Court of Appeals of Vir-

ginia be reversed and a judgment in favor of appellants, and for costs.

R. E. Joyce, John S. Battle, Aubrey G. Weaver, of Counsel for the Appellants. R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia: Weaver, Armstrong and Marshall, Front Royal, Virginia, Counsel for the Appellants.

[fol. 59] Citation in usual form showing service on Abram P. Staples omitted in printing.

[fol. 60] Bond on Appeal for $250.00 approved May 26, 1943, omitted in printing.

[fol. 61] In Supreme Court of the United States

[Title omitted]

Praecipe for Record

To the Clerk of the Supreme Court of Appeals of Virginia:

An appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of Virginia in the above case having been allowed by virtue of an order entered by the Honorable Harlan F. Stone, Chief Justice of the United States, on the 26th day of May, 1943, pursuant to the provisions of Rule 10 of the Rules of the Supreme Court of the United States you will please include the following in the record of the case to be prepared and certified by you to the Supreme Court of the United States:

[fol. 62] 1. The entire record sent up from the Circuit Court of Rappahannock County to the Supreme Court of Appeals of Virginia.

2. The opinion of the Supreme Court of Appeals of Virginia.

3. The decree of the Supreme Court of Appeals of Virginia.

4. The Petition for Appeal to the Supreme Court of the United States.

6. The Jurisdictional Statement.

7. The Assignment of Errors.

8. The Citation to the Appellee.
9. The Acknowledgment of Service by the Appellee of the documents relating to the appeal.
10. The Appeal Bond.
11. This Praecipe.

R. E. Joyce, John S. Battle, Aubrey G. Weaver, Counsel for Appellants. R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia; Weaver, Armstrong and Marshall, Front Royal, Virginia.

[fol. 63] Receipt of a true copy of the foregoing praecipe is hereby acknowledged on this 28th day of May, 1943.

Abram P. Staples, Attorney General of Virginia.
—— ——, Assistant Attorney General of Virginia, Counsel for Appellee.

[fol. 64] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON, DESIGNATION TO PRINT ENTIRE RECORD AND ACKNOWLEDGMENT OF SERVICE THEREOF—Filed July 8, 1943

Now come the above named appellants, pursuant to Paragraph 9, of Rule 13, of the Rules of this Court, and state that the points upon which they intend to rely in this Court in this cause are as follows:

Point I

The State of Virginia has no authority to regulate or otherwise directly burden a shipment of intoxicating liquors which originated in Maryland and is merely passing through Virginia en route to its destination in North Carolina, where there is no intention to sell, dispose of, divert or in any manner use any portion of such shipment within the State of Virginia, or to violate any of the laws of Virginia.

[fol. 65] Point II

Section 4675 (49a) of Michie's Virginia Code of 1942, (Acts of the Virginia Assembly of 1936, page 419) Section 49a of the Virginia Alcoholic Beverage Control Act of

1936, as construed by the Supreme Court of Appeals of Virginia in this cause to authorize the provisions of Regulations Nos. 42 and 44 of the Virginia Alcoholic Beverage Control Board (Order No. 1A adopted August 30, 1940) which require that individuals transporting alcoholic beverages through the State of Virginia carry a bill of lading or other memorandum of shipment specifying the route to be traveled which must be the most direct route to the consignee's place of business; that such bill of lading or other memorandum of shipment disclose the name of the consignee who must be a person who has a legal right to receive such alcoholic beverages at the point of destination, and that persons transporting alcoholic beverages through the State of Virginia shall post with the Alcoholic Beverage Control Board a bond in the sum of One Thousand Dollars ($1,000.) conditioned that such persons will not unlawfully transport alcoholic beverages through the State of Virginia, is repugnant to and in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.

[fol. 66] Point III

Section 4675 (49a) of Michie's Virginia Code of 1942, (Acts of the Virginia Assembly of 1936, page 419) Section 49a of the Virginia Alcoholic Beverage Control Act of 1936, as construed by the Supreme Court of Appeals of Virginia in this cause to authorize the provision of Regulation No. 42 of the Virginia Alcoholic Beverage Control Board (Order No. 1A adopted August 30, 1940) pursuant to which said Board canceled the bond posted under said regulation for the Chevrolet truck which was being used for the transportation through the State of Virginia of the alcoholic beverages involved in this case solely upon the ground that it had received information that the principal on such bond had the reputation of being a bootlegger in the State of North Carolina and without any evidence of a violation of any law of the State of Virginia, is repugnant to and in conflict with Article 1, Section 8, Paragraph 3 of the Constitution of the United States.

Point IV

No State has authority to regulate or impose a direct burden upon interstate commerce unless that authority is

expressly granted by the Constitution or laws of the United States. There is no provision of the Constitution of the United States or of any Act of Congress which grants to [fol. 67] the State of Virginia the power to regulate or impose a direct burden upon a shipment of alcoholic beverages which is merely passing through Virginia en route from its point of origin in Maryland to its destination in North Carolina.

Point V

The State of Virginia has no power or authority to place any restriction upon the shipment of intoxicating liquor through that State other than is reasonably necessary to protect the local public interest against the unlawful disposition or use of such liquor within the State.

The appellants further represent that the whole of the record, as filed, is necessary for the consideration of this case, except the bond and citation upon his appeal.

R. E. Joyce, Jno. S. Battle, Aubrey G. Weaver, Counsel for Appellants. R. E. Joyce, National Press Building, Washington, D. C.; Perkins, Battle and Minor, Charlottesville, Virginia; Weaver, Armstrong and Marshall, Front Royal, Virginia.

[fol. 68] Service of the foregoing stat-ment and designation and receipt of copies thereof acknowledged this 1st day of July, 1943.

Abram P. Staples, Attorney General of Virginia, Counsel for Appellee.

[fol. 69] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—October 11, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing on the merits.

Endorsed on Cover: File No. 47627 Virginia, Supreme Court of Appeals. Term No. 134. John Thomas Carter and Eugene Pearson Macemore, Appellants, vs. The Commonwealth of Virginia. Filed July 1, 1943. Term No. 134 O. T. 1943.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 1 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 134

JOHN THOMAS CARTER AND EUGENE PEARSON MACEMORE,

Appellants,

vs.

THE COMMONWEALTH OF VIRGINIA,

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

STATEMENT AS TO JURISDICTION.

R. E. JOYCE,
JOHN S. BATTLE,
AUBREY G. WEAVER,
Counsel for Appellants.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Basis upon which it is contended the Supreme Court has jurisdiction	1
Statutory provision believed to sustain jurisdiction	2
Statute of the State, the validity of which is involved	2
Date of judgment or decree	5
Nature of the case and rulings of the Court bringing the case within jurisdictional provision relied upon	5
Grounds upon which it is contended the questions involved are substantial	7
Stage of proceedings and manner in which Federal questions were raised	8
Manner in which question involved was passed upon by the Court	10
Cases believed to sustain jurisdiction	12
Exhibit "A"—Opinion of the Supreme Court of Appeals of Virginia in the instant case	13
Exhibit "B"—Opinion of the Supreme Court of Appeals of Virginia in the case of *Dickerson, et als.* v. *Commonwealth*	18

Table of Cases Cited.

Duckworth v. *State of Arkansas*, 314 U. S. 390, 62 Sup. Ct. Rep. 311	7
James Stewart & Co. v. *Sadrakula*, 309 U. S. 94, 60 Sup. Ct. 431, 84 L. Ed. 596	12
Western Turf Assn. v. *Greenburg*, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520	12

STATUTES CITED.

	Page
Constitution of the United States, Article I, Section 8, Clause 3	7
Judicial Code, Section 237 (a) (28 U. S. C. A. 344a), as amended by the Act of January 31, 1928, 28 U. S. C. A. 861a and 861b (45 Stat. 54)	2
Michie's Virginia Code of 1942, Section 4675 (49a), Acts of 1936, p. 434)	2
Regulations of Virginia Alcoholic Beverage Control Board passed pursuant to the above Act, Order No. A-1, adopted August 30, 1940, Section 42	3
Section 44	4

9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 134

JOHN THOMAS CARTER AND EUGENE PEARSON MACEMORE,

Appellants,

vs.

THE COMMONWEALTH OF VIRGINIA.

Appellee.

STATEMENT OF JURISDICTION.

Pursuant to the provisions of Rule No. 12 of the rules of the Supreme Court of the United States, the above named appellants file this, their statement, disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree of affirmance appealed from herein as follows:

1.

Basis Upon Which It Is Contended the Supreme Court Has Jurisdiction.

The Supreme Court of Appeals of Virginia, which is the highest court of said State in which a decision in this suit could be had, has sustained the validity of a statute of

Virginia together with certain regulations having the force and effect of law promulgated by the Virginia Alcoholic Beverage Control Board pursuant to the provisions of the statute, against the contention that said statute and regulations are repugnant to and in conflict with Article I, Section 8, Clause 3 of the Constitution of the United States.

2.

Statutory Provision Believed to Sustain Jurisdiction.

The statutory provision believed to sustain the appellate jurisdiction is Section 237 (a) of the Judicial Code; 28 U. S. C. A. 344 (a); the Act of January 31, 1928, 28 U. S. C. A. 861 (a) 861 (b), 45 Stat. 54.

3.

The Statute of the State, the Validity of Which Is Involved.

The statute of Virginia (Section 49a of the Virginia Alcoholic Beverage Control Act, Acts of 1936, p. 434, Michie's Virginia Code of 1942, Section 4675 (49a), the validity of which is attacked by the appellants is as follows:

> "Section 4675 (49a). *Transportation; Transportation permits; penalties.*—The transportation of alcoholic beverages, other than wine and beer, purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia, in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.
>
> "The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell

same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act within, into or through Virginia in quantities in excess of one gallon, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675 (62) (1936, p. 434.)"

The Regulations of the Virginia Alcoholic Beverage Control Board promulgated pursuant to the provisions of the foregoing statute (Order No. A-1 of the Virginia Alcoholic Beverage Control Board adopted August. 30, 1940), the validity of which was also attacked by the appellants, are as follows:

"Section 42. The transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act, As Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and/or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act as amended."

"Section 44. Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment, signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or other memorandum of shipment shall be the

name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

4.

Date of Judgment or Decree.

The date of the decree sought to be reviewed herein is March 8, 1943, and the date upon which the application for appeal is presented is May 25, 1943.

5.

Nature of the Case and Rulings of the Court Bringing the Case Within Jurisdictional Provisions Relied Upon.

Under the uncontroverted facts in the case the appellants were in the act of transporting by motor truck a shipment consisting of fifty-six cases of whiskey from Dorsey, Maryland, to Thomasville, North Carolina. They were apprehended in Rappahannock County, Virginia, while in the act of transporting the shipment through Virginia. The appellants had with them a bill of lading showing the consignor to be a lawful one, but the shipment was consigned to a person in Thomasville, North Carolina, where, under the laws of North Carolina, the consignee could not lawfully receive the whiskey. The bill of lading contained no routing for the shipment through Virginia. Accompanying the shipment and posted in the cab of the truck was evidence that the owner of the truck, Healton Miller, had posted bond in accordance with the provisions of Section 42 of the Regulations here in question, but this bond had previously been canceled by the Virginia Alcoholic Beverage Control

Board and Miller had been notified thereof. The ground for canceling the bond was that the members of the Board had "information" that Miller had a reputation of being a bootlegger in North Carolina. There was no rumor that he had ever violated the laws of Virginia. It is admitted that the appellants had no intention of diverting the shipment to any channels in Virginia, or that they had violated or intended to violated any of the laws of Virginia other than the Statute and Regulations involved in this case. The uncontroverted facts are that the shipment was destined to North Carolina and, if appellants had not been apprehended the shipment would have passed through Virginia without diversion.

The challenged statute prohibits the transportation of whiskey through Virginia in quantities in excess of one gallon, except in accordance with regulations adopted by the Virginia Alocholic Beverage Control Board, and declared a violation thereof to be a misdemeanor.

Pursuant to the provisions of the statute the Board promulgated the following regulations which the appellants were charged with violating: (1) The person transporting whiskey shall post with the Board a bond with approved surety in the penalty of One Thousand Dollars, "upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into or through the State of Virginia." Evidence that the bond has been posted shall accompany each shipment. (2) There shall accompany each shipment a bill of lading disclosing the route to be traveled while in Virginia, and such route shall be the shortest one from the consignor's place of business to the place of business of the consignee. (3) The consignee must have a legal right to receive the shipment at its destination as shown on the bill of lading.

It is conceded that the shipment in this case was what is

commonly called "through" interstate commerce. There was no intention to divert any of the whiskey into Virginia nor any intention to violate any of the laws of Virginia. The Supreme Court of Appeals of Virginia had before it the question as to whether the Virginia statute and the regulations promulgated pursuant thereto constituted an undue burden upon, or a regulation of interstate commerce by the Commonwealth of Virginia which is prohibited by Article I, Section 8, paragraph 3 of the Constitution of the United States.

In its opinion the Supreme Court of Appeals of Virginia held the challenged statute and said regulations valid as against the contention that when applied to the shipment here involved they were repugnant to and in conflict with said Article of the Constitution of the United States and affirmed the judgment of the trial court imposing a fine of Fifty Dollars and costs upon each of the appellants.

6.

Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

The appellants here have been charged solely with the violation of the laws of Virginia with respect to a shipment of whiskey in through interstate commerce. The statute and regulations in question govern all shipments of whiskey through the State of Virginia except those by public carriers. The question of the validity of the statute and regulations is substantial insofar as any interstate shipments are concerned.

The Supreme Court of the United States in the recent case of *Duckworth* v. *State of Arkansas*, 314 U. S. 390, 62 Sup. Ct. Rep. 311, decided December 15, 1941, upheld the validity of an Arkansas statute requiring a permit for transporters of whiskey through the State of Arkansas,

but the court specifically restricted its approval of regulatory measures to those which do not "interfere with the free flow of commerce across the States beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor *within the State*" (Italics supplied).

The statute and regulations of the Virginia Alcoholic Beverage Control Board which are attacked in this case are much more comprehensive and burdensome than the requirements of the permit under the Arkansas statute and do not fall within the rule pronounced by the court in the *Duckworth* case, *supra*.

The arbitrary cancellation of the bond of Healton Miller not only serves to illustrate the broad power of regulation of interstate shipments conferred on the Virginia Alcoholic Beverage Control Board by the statute in question, but also, in the opinion of the Supreme Court of Appeals of Virginia said statute and regulations should be construed to empower the Board in its discretion to *prohibit* interstate shipments of whiskey by the expedient of refusing to approve a bond or by canceling such bond after it had been posted.

In declaring the said statute and regulations constitutional the Supreme Court of Appeals of Virginia has attempted to broaden the powers of the State to include the regulation of interstate shipments of whiskey which regulation results in an undue burden upon interstate commerce, and thus a substantial question is involved in the instant case.

7.

Stage of Proceedings and Manner in Which Federal Questions Were Raised.

The Federal questions involved in this case were first raised orally upon the trial of the appellant before the Trial Justice of Rappahannock County, Virginia. This is

not a court of record and under the law of Virginia any decision of this Court in a criminal case is appealable to the Circuit Court of Rappahannock County, Virginia, as a matter of right, where the case is heard *de novo*.

The Federal questions were again raised upon the trial of the case in the Circuit Court of Rappahannock County, Virginia, upon an oral motion to strike out all of the evidence submitted by the Commonwealth and to dismiss the warrant upon the following grounds, among others, assigned in writing (R. 36):

> "4. That said Act and said regulations are unconstitutional in that they violate Article I, Section 8, clause 3 of the Constitution of the United States (by) regulating commerce between two States and/or imposing a burden upon interstate commerce.
>
> "5. That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was unlawful and violative of the defendants' rights under the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States."

After the judgment of the Circuit Court of Rappahannock County, Virginia, finding the appellants guilty as charged, the Federal questions were again raised upon an oral motion in open court for a new trial, upon the same grounds stated in writing as those assigned in the said motion to strike out all of the evidence of the Commonwealth (R. 37).

The Federal questions were again raised in the petition of the appellants for a writ of error and in their briefs filed in the Supreme Court of Appeals of Virginia. In the appellants' petition for a writ of error was contained a statement of their assignments of error wherein were set forth the following (R. 4):

> "3. That said Act and said Regulations are unconstitutional in that they violate Article I, Section 8,

Clause 3 of the Constitution of the United States (by) regulating commerce between the States and/or imposing a burden upon interstate commerce.

"5. That the cancellation of the bond of Healton Miller on May 1, 1942, by the said Board was unlawful and violative of the defendants' rights under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States."

In each instance the trial court overruled the motion of the appellants and the Supreme Court of Appeals of Virginia, after granting the writ of error, affirmed the judgment of the lower court.

Under the practice in Virginia the petition for a writ of error forms a part of the record in the Supreme Court of Appeals. The petition was adopted as the opening brief of the appellants, and under Section III (R. 17, 18 and 19), and under Section V (R. 20) of the petition the Federal questions were raised and stated.

8.

Manner in Which Questions Involved Were Passed Upon by the Courts.

The Trial Justice of Rappahannock County, Virginia, overruled the motion of the appellants and entered judgment finding the appellants guilty of the charges set forth in the warrant (R. 26).

The Circuit Court of Rappahannock County, Virginia, overruled the motion of appellants to strike out all of the evidence and to dismiss the warrant and entered judgment against them finding them guilty of the charges set forth in the warrant (R. 31, 37).

The Circuit Court of Rappahannock County, Virginia,

also overruled the motion of the appellants for a new trial (R. 37) and entered final judgment against the appellants finding them guilty of the charges set forth in the warrant and fining them each the sum of Fifty Dollars and costs.

The Supreme Court of Appeals of Virginia sustained and affirmed the judgment of the court below, and held the questioned statute and the regulations promulgated pursuant thereto to be valid. In its opinion (p. 16[1]) the court held the regulations to be "reasonable aides in preventing the unlawful distribution and sale of alcoholic beverages in the State", quoting the *Duckworth* case, *supra*.

The Supreme Court of Appeals of Virginia further held that the Virginia Alcoholic Beverage Control Board had the right to cancel the bond of Healton Miller "with or without notice" (Opinion page 17[1]).

9.

Copy of Opinion on Rendition of Judgment.

A copy of the opinion of the Supreme Court of Appeals of Virginia designated Exhibit "A" is hereunto attached and appended. At the same time that the opinion in the instant case was rendered the Supreme Court of Appeals of Virginia rendered its opinion in a companion case involving some of the identical questions, under the style of *Earl Dickerson, W. O. Page and one 1939 Ford Truck* versus *Commonwealth of Virginia*, Record No. 2666. This case is referred to in the opinion rendered by the court in the instant case. For the convenience of the court we have hereunto attached and appended the opinion rendered in the *Dickerson* case, which we have entitled Exhibit "B".

---

[1] (Pages of the opinion of the Supreme Court of Appeals of Virginia referred to above are the pages of this statement to which said opinion is appended).

10.

Cases Believed to Sustain Jurisdiction.

Western Turf Ass'n. v. *Greenberg*, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 520;

James Stewart & Co. v. *Sadrakula*, 309 U. S. 94, 60 S. Ct. 431, 84 L. Ed. 596.

Respectfully submitted.

R. E. JOYCE,
JOHN S. BATTLE,
AUBREY G. WEAVER,
Attorneys for Appellants.

R. E. JOYCE,
National Press Building,
Washington, D. C.
PERKINS, BATTLE AND MINOR,
Charlottesville, Virginia.
WEAVER, ARMSTRONG AND MARSHALL,
Front Royal, Virginia.
Counsel for Appellants.

EXHIBIT "A".

Record No. 2668

Present: Campbell, C. J., Hudgins, Gregory, Browning, Eggleston and Spratley, JJ.

JOHN T. CARTER AND E. P. MACEMORE,

v.

COMMONWEALTH OF VIRGINIA.

Opinion by Justice C. Vernon Spratley, Richmond, Va., March 8, 1943.

From the Circuit Court of Rappahannock County; J. R. H. Alexander, Judge.

This is a companion case to *Earl Dickerson, W. O. Page, and one 1939 Ford Motor truck, etc.* v. *the Commonwealth of Virginia*, decided this day.

The evidence in the two cases is somewhat different, but the principal assignments of error are based upon the same grounds. This case, however, has certain additional assignments of error based upon the specific offenses alleged against the appellants.

John T. Carter and E. P. Macemore were on September 14, 1942, jointly convicted of unlawfully transporting whiskey within, into and through Virginia. The specific charges against them were that the bill of lading for their whiskey shipment showed that it was being transported to a person who did not have a legal right to receive it at the point of destination shown thereon, as required by section 44 of the regulations of the A. B. C. Board of Virginia; that the bill of lading did not specify the route to be travelled by their truck in Virginia, as required by section 42 of the regulations; and that the appellants had posted no bond.

The case was tried by the court without the intervention of a jury upon an agreed stipulation of facts. The facts may be briefly stated as follows:

On May 20, 1942, the appellants received from a wholesale liquor dealer in Dorsey, Maryland, a shipment of 168

gallons of whiskey consigned to R. M. Williard at Thomasville, North Carolina. The whiskey was loaded on a truck, and immediately driven into Virginia by the appellants. Carter and Macemore said they intended to transport it through Virginia into North Carolina. They were apprehended and arrested in Rappahannock County, Virginia. They produced a bill of lading showing the correct amount of whiskey contained in the shipment, and disclosing the consignee to be a resident of North Carolina. Under the laws of North Carolina, the consignee could not lawfully receive the whiskey at its destination. The bill of lading specified no route for the truck to follow while in Virginia.

The truck was registered in the name of Healton Miller, a resident of North Carolina, who had posted, on March 26, 1942, a bond as required by section 42 of the Regulations of the Virginia Alcoholic Beverage Control Board; but the Board had notified Miller on May 1, 1942, of the concellation of the bond and demanded the return of the certificate issued thereon. The bond had been cancelled upon information that Miller had the reputation of being a bootlegger in North Carolina. There was no evidence that Miller had ever violated the laws of Virginia.

Virginia Code, 1942, (Michie) section 4675 (5) and (49a) and section 44 of the Regulations of the Virginia Alcoholic Beverage Control Board have been set out in the companion case. Section 42 of the said regulations reads as follows:

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act, as Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into, or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the

required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and/or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

It is here contended that the Virginia Alcoholic Beverage Control Act is unconstitutional, in that (1) the legislature did not have the power to delegate to the Alcoholic Beverage Control Board the right to adopt regulations having the force and effect of law; (2) that the Board did not have the authority to adopt sections 42 and 44 of its Regulations; (3) that the above sections are unconstitutional, in that they violate Article 1, section 8, clause 3 of the Constitution of the United States by imposing a burden upon interstate commerce; and (4) that the cancellation of the bond of Healton Miller was not a valid action under the power conferred upon the Board and was violative of the rights of the appellants under the commerce clause of the Federal Constitution.

What we have said in *Earl Dickerson, W. O. Page, and one 1939 Ford truck, etc.* v. *Commonwealth, supra,* applies and controls here upon similar questions raised by the appellants.

The bond required under section 42 of the regulations is for the purpose of insuring the fitness and integrity of the carrier of the liquor. It is evidence of his responsibility and a guaranty of lawful transportation. It confines the transportation to a channel deemed trustworthy.

The requirement that the bill of lading or other memorandum of shipment shall designate the route to be travelled

in Virginia enables agents of the Board and the State police to inspect the shipment in transit, to keep a watch over its movements, and to discourage and prevent its unlawful delivery or distribution within the State. It is but an incident of local regulation over a subject which, if left to unrestrained movement, has a tendency to affect the public safety and welfare.

Both requirements are reasonable aids in preventing the unlawful distribution and sale of alcoholic beverages in the State. They are consistent with the provisions and purpose of the Alcoholic Beverage Control Act to regulate and control the liquor traffic and hold it within confined limits. Neither requirement forbids or precludes the lawful transportation of ardent spirits in interstate commerce. Each tends to make regulation effective.

See *Ziffrin* v. *Reeves*, 308 U. S. 132, 84 L. Ed. 128, where a State statute limiting transportation to specified common carriers was upheld, and *Duckworth* v. *Arkansas*, 314 U. S. 389, 86 L. Ed. 294, 138 A. L. R. 1144, where a statute requiring a permit for transporting liquor was declared valid.

Miller, the only person who had the right to challenge the cancellation of his bond, is not a party to this proceeding. There is no evidence that he protested the action of the Board. It does not appear from the record what connection he had with the transportation of the whiskey, nor whether Carter and Macemore were his agents. We are not told whether the latter were using the truck with or without Miller's knowledge, or what action, if any, he may have taken to protest his property rights in the truck.

The bond is conditioned that the carrier will not engage in the unlawful transportation of alcoholic spirits within, into or through the State of Virginia. Evidence of its posting with the Board constituted a permit,—a permit to lawfully transport. Cancelled or uncancelled, it gives no one a permit for unlawful transportation.

Whether or not the appellants might have given an acceptable bond for interstate transportation through Virginia is not an issue here. If such a bond had been given,

it would have permitted lawful transportation; but it would have afforded no defense to an unlawful carriage.

The requirement for the posting of a bond is a regulation of a police nature. The Board having the authority to require the bond, under the police powers conferred upon it by the A. B. C. Act, had the right to cancel it with or without notice under the same power if, in the exercise of a reasonable discretion, it was satisfied that it was being used or about to be used against the public safety and welfare.

It is not to be presumed that the authority of the Board will be arbitrarily used; but in the event that it is abused, a person feeling himself aggrieved may seek judicial relief in the courts.

In support of their contention that the regulations of the Board impose a burden upon interstate commerce, the appellants cite the recent case of *Barnett* v. *State*, Ala., 9 So. (2d) 267. The Alabama court did not have before it for decision statutes or regulations involving the questions here raised. In that case, it was held that the Twenty-first Amendment to the Federal Constitution did not authorize the seizure and condemnation of liquors and transporting vehicles under existing Alabama statutes, where such liquors were being transported through Alabama to another State for disposition in violation of the laws of the latter State. In the case before us the prosecution of the appellants is based upon specific statutes of Virginia.

The judgment of the trial court is affirmed.

Affirmed.

EXHIBIT "B".

Present: Campbell, C. J., Hudgins, Gregory, Browning, Eggleston and Spratley, JJ.

Record No. 2666.

EARL DICKERSON, W. O. PAGE and ONE 1939 FORD TRUCK, MOTOR No. 99T28531,

v.

COMMONWEALTH OF VIRGINIA.

OPINION BY JUSTICE C. VERNON SPRATLEY, Richmond, Va., March 8, 1943.

From the Circuit Court of Prince William County; Walter T. McCarthy, Judge.

This case comes before us upon a writ of error granted to a judgment and two orders entered on June 10, 1942, in the Circuit Court of Prince William County, Virginia. The judgment found Earl Dickerson guilty of transporting intoxicating liquor in excess of one gallon within, into and through the State of Virginia, to a consignee in the State of North Carolina, who could not lawfully receive such liquor. One of the orders condemned and ordered to be sold the Ford truck transporting the liquor, and the other order confiscated and forfeited to the Commonwealth 762 gallons of alcoholic beverages loaded on the truck. The three cases were consolidated for trial by and with the consent of the parties, and heard by the court without the intervention of a jury.

The facts, identical in the three cases and presented in a written stipulation, may be briefly stated as follows:

On May 5, 1942, in the County of Prince William, Virginia, Earl Dickerson was found driving a 1939 Ford truck, Motor No. 99T28531. The truck was loaded with 762 gallons of whiskey, and was being driven by Dickerson along U. S. Route No. 1, in the direction of North Carolina, when it was seized by a police officer of this State.

At the time of his arrest, Dickerson did not present to the police officer any evidence that he or any other person had filed with the Virginia Alcoholic Beverage Control Board any bond covering the transportation of the alcoholic beverages within, into or through the State of Virginia. He had a bill of lading or memorandum of shipment showing that the liquor had been purchased from a *bona fide* wholesale whiskey dealer at Dorsey, Maryland, and that it was consigned to William O. Page, trading as Page Trading Company, Garland, North Carolina. The bill of lading did not designate any route to be travelled while in Virginia.

Upon his trial, Dickerson produced evidence of a transportation bond posted with the Board by William O. Page of Wilson, North Carolina, as a carrier. William O. Page is the same person as W. O. Page, the appellant here.

Both Page and Dickerson were residents of the State of North Carolina, and the Ford truck, which was owned by Page, was duly licensed in that State.

The alcoholic beverages were being transported to North Carolina along U. S. Route No. 1, the most direct route, between Dorsey, Maryland, and Garland, North Carolina. Page was not a lawful consignee under the laws of North Carolina. The laws of that State do not permit the transportation by one person of more than one gallon of alcoholic spirits within its borders or its sale by individuals.

The prosecution was conducted under section 44 (c) of the Regulations of the Virginia Alcoholic Beverage Control Board, hereinafter sometimes referred to as the A. B. C. Board.

Appellants seek a reversal of the judgment and orders upon the following grounds: (1) That the legislature of Virginia had no authority to delegate to the Virginia Alcoholic Beverage Control Board the power to adopt regulations governing the transportation of alcoholic beverages within, into and through Virginia; (2) That the regulations of the Board "have no extra-territorial effect and are null and void insofar as a non-resident is concerned;" and (3) that the regulations dealing with the transportation of alcoholic beverages through the State of Virginia constituted a burden upon interstate commerce.

The whole of section 44 of the Regulations of the A. B. C. Board reads as follows:

"Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported; the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on th bill of lading or other memorandum of shipment."

The Alcoholic Beverage Control Act of Virginia, Virginia Code, 1942 (Michie) chapter 184A, section 4675, subsections (1) to (69a), (Acts of Assembly, 1934, page 100, *et seq.*), created as a department of the Commonwealth of Virginia. The Department of Alcoholic Beverage Control. The department, designated as the Virginia Alcoholic Beverage Control Board, consists of a board of three members, and

the officers, agents and employees of the Board, (section 4675 (3)), with functions, duties, and powers authorized and prescribed by the Act.

The purpose of the A. B. C. Act, as set out in its title is "to legalize, regulate and control the manufacture, bottling, sale, distribution, transportation, handling, advertising, possession, dispensing, drinking and use of alcohol, brandy, rum, whiskey * * * and all liquids, beverages and articles containing alcohol obtained by distillation, fermentation or otherwise * * *; to provide for the confiscation and disposition of articles declared contraband hereunder * * *; to impose penalties for violations of the act * * *" Acts of Assembly, 1934, chapter 94, page 100, *et seq.*

The pertinent sections of the Act dealing with the subject before us are:

Code Section 4675 (5). "Power to make regulations; how published; effect thereof.—(a) The board may from time to time make such reasonable regulations, not inconsistent with this act, nor the general laws of the State, as the board shall deem necessary to carry out the purposes and provisions of this act and to prevent the illegal manufacture, bottling, sale, distribution and transportation of alcoholic beverages, or any one or more of such illegal acts, and from time to time alter, repeal, or amend such regulations or any of them. Such regulations shall be published * * *, and upon being so published shall have the force and effect of law. * * *"

Code Section 4675 (49a). "Transportation, transportation permits; penalties.—The transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The Board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this

State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through Virginia in quantities in excess of one gallon as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages, other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675 (62)." (1936 p. 434.)

The regulation and control of liquor traffic—the manufacture, sale, and transportation of alcoholic beverages—has long been a difficult problem. Because of the recognized evils attendant upon the traffic it has been held to be subject to the police power of the State, in the interest of the safety, health, and well-being of the local communities. The act of 1934 was most carefully, skillfully and comprehensively drawn, with purposes definitely set out to rigidly control and regulate the liquor traffic in all of its phases.

Section 4675 (5) expressly empowers the A. B. C. Board to make, from time to time, such reasonable regulations as the Board may deem necessary to carry out the purposes and provisions of the Act, and to prevent the illegal manufacture, sale, possession, use, transportation, etc., of alcoholic beverages.

Section 4675 (49a) enacted in 1936, as an amendment to the original Act, expressly prohibits the transportation of alcoholic beverages, in excess of one gallon, other than wine and beer purchased from persons licensed to sell the same in this State, within, into or through this State, except in accordance with the regulations adopted by the A. B. C. Board. It further expressly authorizes and empowers the Board to adopt such regulations governing the transportation of such beverages in excess of one gallon within, into or through Virginia, "as it may deem neces-

sary to confine such transportation to legitimate purposes," and "to issue transportation permits in accordance with such regulations." It provides that a person violating such regulations shall be guilty of a misdemeanor, and punished as provided by section 4675 (62).

Thus may be clearly seen in the title to the Act, in the provisions of the above sections of the Act, and in many of its other provisions, the definite policy of the legislature to control and regulate the liquor traffic within the standards prescribed by the Act. A machinery of control was created and supplied with authority for efficient operation.

The Board is limited to the making of reasonable regulations to carry out the purposes and provisions of the Act, provided they are not in conflict with the Act or the general laws of the State. This is the definite standard and intelligible principle to which the Board must conform. This standard confines transportation to legitimate purposes. It does not interfere with legitimate transportation in accordance with reasonable regulations.

There is nothing indefinite about the adjective "legitimate." In its usual and common acceptance, as defined in Webster's New International Dictionary, Second Edition, Unabridged, it means "accordant with law or with established legal forms and requirements" or "lawful". In this case, its meaning is so clear that it is conceded that W. O. Page, consignee of the liquor in question, is an unlawful consignee. A transportation to an unlawful consignee is a transportation not in "accordant with law" or for a "lawful" purpose.

Much has been said and written with reference to the cardinal principle of our fundamental law that a legislature ought not and cannot delegate its power to make laws to any other department or body. The line of demarcation between legislative functions, which must be exercised by the legislature itself, and those functions of an administrative or executive nature which may be delegated to a board or an officer, is not always clear. The question has been considered by many courts in this country, State and Federal, including this court.

In the complex civilization under which we live, if the legislature were compelled to make provisions for all the minutiae of regulation of industry, economics, and human conduct, it would be deprived of much of the power of effective legislation to protect the safety, general welfare, and morals of the public.

The delegation of power to make administrative rules and regulations for the purpose of carrying out the policy of the law making body within the standard set by it, is exemplified in the grants to municipal and local bodies, to public service commissions, to health and sanitary boards, to commissions charged with the duty of carrying out statutes designed to control diseases of stock, trees, and crops, to building and zoning commissions, to commissions supervising the production and sale of milk, and many other boards and agencies charged with the duty of prompting the public welfare.

The legislature is not continuously in session. It cannot exercise direct or immediate supervision over State agencies. It must act, if it acts at all, in many cases through its agents or agencies to make its legislation effective. It cannot perform its more important duties if it has to pass on the fitness of a particular individual to have a license to sell wine or beer, or to receive or transport whiskey or gin. In many matters, it must confine itself to the making of policies and the fixing of standards under which its agents or agencies may operate. To deny the right of these agencies to function effectively would set at naught the express purpose of the legislation.

See an exhaustive annotation on the "Permissible Limits of Delegation of Legislative Power", 293 U. S. 448, 79 L. Ed. 474.

Mr. Justice Holt, in *Southern Railway Company* v. *Commonwealth*, 159 Va. 779, 167 S. E. 568, reviewed and discussed leading cases dealing with this subject. We there subscribed to the rule that there may be a valid delegation of legislative power to an agent to determine facts and things upon which action under a statute depends, where a

statute sufficiently indicates the legislative purpose and merely leaves administrative details to an agent.[2]

In Taylor *v.* Smith, 140 Va. 217, 124 S. E. 259, Judge Burks, in discussing the delegation of power to make regulations, quoted with approval the following from Block *v.* Chicago, 239 Ill., 251, 87 N. E. 1011, 130 Am. St. Rep. 219:

"It is true that a legislative body cannot divest itself of its proper function to determine what the law shall be, but it may authorize others to do those things which it might properly, but cannot understandingly or advantageously do. That rule was stated as long ago as the case of People *v.* Reynolds, 5 Gilm. 1, where it was said that without that power legislation would become oppressive and yet imbecile, and that local laws, almost universally, call into action to a greater or less extent the agency and discretion either of the people or individuals to accomplish in detail what is authorized or required in general terms. Government could not be carried on if nothing could be left to the judgment and discretion of administrative officers, and the doctrine of that case has been steadily adhered to ever since."

In Thompson *v.* Smith, 155 Va. 367, 154 S. E. 579, it was said:

"Mere matters of detail within the policy, and the legal principles and standards established by the statute or ordinance, may properly be left to administrative discretion, for the determination of such matters of detail is more essentially ministerial than legislative. In declaring the policy of the law and fixing the legal principles and standards which are to control in the administration of the law, general terms, which get precision from the technical knowledge or sense and experience of men and thereby become reasonably certain, may be used; and an administrative officer or bureau may be invested with the power to

[2] The Supreme Court of the United States reversed our judgment in this case. 290 U. S. 190, 78 L. Ed. 260. The Majority of that Court held that the statute involved was not merely a police regulation and that it was violative of the due process clause of the Federal Constitution.

ascertain and determine whether the qualifications, facts or conditions comprehended in and required by such general terms exist, and whether the provisions of the law so fixed and declared have been complied with in accordance with the generally accepted meaning of the words."

In the case of *Assaid* v. *Roanoke*, 179 Va. 47, 18 S. E. (2d) 287, a delegation of authority to a ministerial officer, without declaring the policy of the law which was to control the officer in exercising his opinion, was declared invalid.

The appellants rely upon *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446 and *Schecter Poultry Corporation* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570. In each case, the regulations of administrative boards were declared invalid as being enacted in pursuance of an unlawful delegation of legislative power, in that the delegation of power contained no definition of the conditions and circumstances under which the acts sought to be regulated were to be allowed or prohibited, that is, failed to set up definite standards to be followed by such boards in the execution of their duties. The opinions in these cases review and illustrate the principle of law involved and exemplify its application to the peculiar circumstances reviewed. The facts in those cases distinguish them from the case here.

Code, section 4675 (5) and (49a) and section 44 of the regulations of the A. B. C. Board are intended to protect citizens of Virginia from the illicit delivery, sale, and transportation of ardent spirits. We cannot escape the conclusion that one who deliberately and intentionally violates the Federal Constitution and the law of his resident State, in the unlawful transportation of liquor would hardly hesitate to violate the laws of this State while passing through it if he thought he might profit thereby. We cannot shut our eyes to the possibilities of such a situation and the necessity of prevention. The provisions of the statute and the regulations of the Board in accordance therewith are reasonably designed to avoid the threatened evil. They afford no complaint to one engaged in a lawful enterprise.

Section 44 (e) has no extra-territoriality, and we do not understand that the Commonwealth contends it has. The law of North Carolina is not in question here. The appellants are not charged with, or being tried for, violating the law of North Carolina. Page, the consignee, is not personally a defendant. He has intervened in the case only as a claimant of the condemned truck and confiscated liquor. Dickerson is charged with transporting liquor to an unlawful consignee,—a transportation not for a legitimate purpose, in violation of the laws of Virginia. The issue hinges upon his guilt or innocence of that specific offense.

But, say the appellants, Virginia, under its police power, can only legislate with respect to a resident consignee and the regulation was intended to apply only where the unlawful consignee resided in Virginia. This contention overlooks the language of our statute, the language of the regulation, and the effect of the Twenty-first Amendment to the Federal Constitution. The statute authorizes the Board to confine all transportation of liquor within, into or through Virginia to legitimate purposes. The regulation confines its transportation to one who has a legal right to receive the shipment at its stated point of destination, that is, to a lawful consignee.

Whether or not North Carolina had a law forbidding the receipt of the shipment by the consignee was a question of fact,—not a question of law. The provisions of that law were not in dispute. Its existence or reality only was involved. None of its provisions here required construction or interpretation.

The Twenty-first Amendment of the Federal Constitution, the supreme law of the land, provides as follows:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Under both the Federal Constitution and the laws of Virginia, the transportation of the liquor through Virginia was for an unlawful purpose. The liquor was contraband,

—a contraband subject to immediate seizure under the laws of Virginia. Virginia Code, 1942, (Michie) section 4675 (36). Its carrier was a violator of those laws.

The next question is *whether section 44 (c) of the regulations of the A. B. C. Board constitutes a burden upon interstate commerce.* The appellants rely upon Martin *v.* Commonwealth, 126 Va. 715, 100 S. E. 836; Williams *v.* Commonwealth, 169 Va. 857, 192 S. E. 795; and Surles *v.* Commonwealth, 172 Va. 573, 200 S. E. 636, for an affirmative answer.

Martin *v.* Commonwealth, supra, was decided in 1919. At that time there was no Virginia statute regulating the transportation of liquor through Virginia in interstate commerce. The determination of the two subsequent cases was based upon our conception of the construction then placed by the Supreme Court of the United States upon the Constitution of the United States and the Acts of Congress relating to interstate commerce then effective.

In recent years, the Supreme Court of the United States has greatly broadened its views as to the permissible extent to which the several States may regulate and control the transportation of liquor in interstate commerce. This extension is based, with reason, we think, upon the attendant dangers to the communities from the unregulated transportation of such beverages into, within or through the local communities, and upon the spirit and letter of the Twenty-first Amendment to the Constitution of the United States.

Where reasonable regulations affecting the interstate transportation of liquor are in the interest of the safety, health and well-being of local communities and merely give added assurance that the liquor will be transported without diversion or unlawful distribution within the States, the Supreme Court now holds that a State may enact effective statutes and measures under its police power to accomplish the desired end.

In Ziffrin *v.* Reeves, 308 U. S. 132, 84 L. Ed. 128, decided November 13, 1939, the Court upheld a regulation of the Kentucky Alcoholic Beverage Control Law restricting the

transportation of liquor to a common carrier, such as a railroad or express company, authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulations. Ziffrin had permission under the Federal Motor Carrier Act, 1935, (Title 49 U. S. C. A., section 301, et seq.) to operate as a common carrier, but was denied a certificate to transport liquor in interstate commerce, although he had previously thereto continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Illinois.

Mr. Justice McReynolds, in upholding the right of Kentucky to enact the regulation, although it imposed some burden upon interstate commerce, said: "The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them." (Citing cases.)

He further said that the regulation was within the police power of the state and that whiskey removed from permitted channels was contraband and subject to immediate seizure and not to be regarded as a proper article of commerce.

In Duckworth *v.* State of Arkansas, 314 U. S. 390, 86 L. Ed. 294, 138 A. L. R. 1144, decided December 15, 1941, the Court upheld a provision of an Arkansas statute, requiring a permit to be obtained for the transportation of intoxicating liquor within the boundary of that State, as a local police regulation permissible under the commerce clause of the Federal Constitution. The Arkansas statute made it unlawful for any person to ship into the State any distilled ardent spirits without first having obtained a permit from the State Commissioner of Revenue under rules and regulations promulgated by the Commissioner. Duckworth

was arrested in Arkansas while engaged in transporting, without a permit, a load of liquor from a point in Illinois through Arkansas to a point in Mississippi. At the time of his offense, there were no regulations regulating transportation of liquor through Arkansas, the regulations then in force being adapted to transportation and delivery within the State. The appellant admitted that the intoxicating liquor was intended to be transported into Mississippi for illegal use there; but the majority of the Court did not take that into consideration.

The issue in the above case involved transportation alone, there being no question of sale or use within the State of Arkansas. Mr. Chief Justice Stone, in referring to other cases where local restrictions had been deemd a burden upon interstate commerce, there said: "The present scheme of regulation is narrower in operation and has a less restrictive effect upon the commerce. It does not forbid the traffic in liquor, nor does it impede it more than is reasonably necessary to inform the local authorities who is to effect the transportation through the State, and to afford opportunity for them to police it."

We quote further from his opinion because of its bearing upon the instant case:

"While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce, as we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation, without impairing the uniformity of con-

trol over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court, notwithstanding the commerce clause."

These later decisions of the Supreme Court have the effect of overruling our conclusions in the cases of *Williams* v. *Commonwealth, supra,* and *Surles* v. *Commonwealth, supra.*

We are bound by the judicial construction placed upon the provisions of the Federal Constitution by the Supreme Court of the United States. It is the final authority on that subject.

"It is a fundamental principle of the constitutional system of government of the United States that the decisions of the Federal Supreme Court are final and authoritative declarations as to the proper and correct construtcion to be placed on the Constitution and laws of the United States, and as to whether a state law contravenes any provisions of the Federal Constitution. On this principle, the construction given by that court to the Constitution and laws of the United States is received by all as the true construction • • •." 11 Am. Jur., Constitiuonal Law, section 104 and cases cited; 6 R. C. L. Constitutional Law, section 82.

We conclude that section 44 (c) of the regulations of the A. B. C. Board is a reasonable requirement to accomplish the purposes and objects of the Virginia Alcoholic Beverage Control Act. It affords no just ground of complaint to a lawful transporter, consignor, or consignee. It does not prevent or interfere with lawful interstate transportation. The execution and delivery of a bill of lading is a mere incident of business. It is not difficult to truthfully and lawfully state both the name of the consignor and consignee. As a matter of fact and of law, this is what should always be done. Section 44 (c) only requires that

to be done which is reasonable and necessary to protect the public's interest in preventing the unlawful distribution or use of whiskey within Virginia. Judicial relief may be asked for only when the regulations of the Board are unreasonable or arbitrary.

We find no error in the judgment and order of the trial court, and they are affirmed.

Affirmed.

(6940)

BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 134.

JOHN THOMAS CARTER and EUGENE PEARSON MACKEMIE,
Appellants,

v.

THE COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF APPELLANTS.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

R. E. JOYCE,
JOHN S. BATTLE,
AUBREY G. WEAVER,
Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Index.

	Page
Grounds on Which the Jurisdiction of this Court is Invoked	2
Statement of the Case	3
Assigned Errors which are Intended to be Urged	4
Argument	5
The Effect of Congressional Enactment and Constitutional Amendment	8
Judicial Definition of the Powers of the States Over Interstate Shipments of Intoxicating Liquors	15
The Requirement that the Transporter Designate Upon the Bill of Lading the Route to be Traveled Through Virginia Which Must be the Most Direct From the Consignor's Place of Business to the Place of Business of the Consignee	20
The Requirement of a Bond Subject to Cancellation in the Discretion of the Virginia Alcoholic Beverage Control Board	23
The Requirement That the Consignee Have a Legal Right to Receive the Shipment at its Destination	29
The Cumulative Effect of the Virginia Regulations	32
The Right of Appellants to Raise the Constitutional Questions	34
Conclusion	37

TABLE OF CASES CITED.

Adams Express Co. v. Kentucky (No. 1), 214 U. S. 218, 29 S. Ct. 633, 53 L. Ed. 972 ..... 8, 15

Adams Express Co. v. Kentucky (No. 2), 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267 9

Asher v. Texas, 128 U. S. 129, 32 L. Ed. 368 24

Page

Bowman v. Chi. & N. W. R. Co., 125 U. S. 465, 31 L. Ed. 700 15
Bradley v. Public Utilities Comm. of Ohio, 289 U. S. 92, 53 S. Ct. 577, 77 L. Ed. 1053 18
Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623 ..... 18, 22, 26, 27
Bush & Sons Co. v. Malloy, 267 U. S. 317, 45 S. Ct. 326, 69 L. Ed. 627 ..... 18, 26
California v. Thompson, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 ..... 17, 32
Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 37 S. Ct. 715, 59 L. Ed. 1137 26
Clark Distilling Co. v. W. Md. Ry. Co., 242 U. S. 311, 61 L. Ed. 326 9
Commonwealth v. White, 166 Ky. 528, 179 S. W. 469 10
Cooley v. Board of Wardens of Phila., 12 How. 299 27
Crescent Liquor Co. v. Platt, 148 F. 894 8
Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649 24
Cunard S. S. Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894 12
D. E. Foote & Co., Inc., v. Stanley, 232 U. S. 494, 59 L. Ed. 698 26
Dickerson v. Commonwealth, 181 Va. 313, 24 S. E. (2) 550 ..... 14, 37
Di Santo v. Pennsylvania, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524 17
Duckworth v. State of Arkansas, 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294 ..... 14, 15, 22, 28, 32, 33, 36
Dugan v. Bridges, 16 F. Supp. 694 11
Dunn v. U. S., 98 F. (2) 119 ..... 12, 13
Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. Ed. 544 23
Ford v. Cox, 165 Va. 239 29
Gatewood v. North Carolina, 203 U. S. 531, 27 S. Ct. 167, 51 L. Ed. 305 23
General Sales & Liquor Co. v. Becker, 14 F. Suppl. 348 12
Goldsmith Grant Co. v. U. S., 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376 13
Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527 ..... 17, 22, 26
Harneford & Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 34

Page

Hatch v. Reardon, 204 U. S. 152, 27 S. Ct. 188, 51 L. Ed. 415 ..... 34, 35
Indianapolis Brewing Co. v. Liquor Control Commissioner, 305 U. S. 391, 59 S. Ct. 254, 83 L. Ed. 243 .. 12
Jameson & Co. v. Morganthau, 307 U. S. 171, 59 S. Ct. 804, 83 L. Ed. 1189 12
Johnson v. Yellow Cab Transit Co., 137 F. (2) 234 18
Ex parte Jervey, 66 F. 957 8
Joseph Triver Corp. v. Arundel, 11 F. Suppl. 145 11
Kirmeyer v. Kansas, 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721 15
Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 393 15
Liberty Highway Co. v. Michigan Pub. Utilities Commission, 294 F. 703 18
Lilienthal v. U. S., 97 U. S. 237, 24 L. Ed. 901 13
Lipke v. Lederer, 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061 25
Louisville & Nashville R. Co. v. W. F. Cook Brewing Co., 223 U. S. 70, 36 L. Ed. 355 15
Martin v. Commonwealth, 126 Va. 715, 100 S. E. 836 .. 10
McCall v. California, 136 U. S. 104, 34 L. Ed. 391 24
McFarland v. American Sugar Refg. Co., 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899 36
Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445 18
Nesmith v. Shelbon, 7 How. 812 23
Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. Ed. 394 24
Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 17 S. Ct. 45, 49 L. Ed. 925 8
Ex parte Peede, 75 Tex. Cr. R. 247, 170 S. W. 749 10
People ex rel. Schwab v. Grant, 126 N. Y. 473; 27 N. E. 964 25
Pervear v. Commonwealth, 5 Wall. 475 27
Pickard v. Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785 24
Polk v. Wendal, 9 Cranch. 87 23
Postal Telegraph Co. v. Adams, 155 U. S. 688, 39 L. Ed. 311 25
Premier-Pabst Sales Corp. v. Grosscup, 12 F. Supp. 970, affirmed 298 U. S. 226, 56 S. Ct. 754, 80 L. Ed. 1155 ..... 11, 13, 34
Premier-Pabst Sales Corp. v. McNutt, 17 F. Supp. 708 8

Page

In re Rahrer, 140 U. S. 545, 35 L. Ed. 572 8
Red Ball Transit Co. v. Marshall, 8 F. (2) 635 18
Rhodes v. Iowa, 170 U. S. 412, 42 L. Ed. 1089 8
Richmond v. Epes, 98 Va. 233, 35 S. E. 723 29
Robbins v. Shelby County Taxing District, 120 U. S. 489, 30 L. Ed. 694 24
Rossi v. Pennsylvania, 238 U. S. 62, 35 S. Ct. 677, 59 L. Ed. 1201 ..... 8, 15
Schwierman v. Highland Park, Ky. 113 S. W. 507 25
Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819 27
Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833 26
Soutenburgh v. Hennick, 129 U. S. 141, 32 L. Ed. 637 .. 24
Surles v. Commonwealth, 172 Va. 573, 200 S. E 636 ..... 14, 21, 37
U. S. v. Gudger, 249 U. S. 373, 39 S. Ct. 323, 63 L. Ed. 653 ..... 11, 12, 14
U. S. v. Ju Toy, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040 35
Vance v. W. A. Vandercook & Co. (No. 1), 170 U. S. 438, 42 L. Ed. 1100 ..... 15, 24, 25
Van Winkle v. State, 4 Boyce 578, 91 Atl. 385 10
Walker v. Harbor Comrs., 17 Wall. 648 23
Wilder v. Kelley, 88 Va. 274, 13 S. E. 483 29
Williams v. Commonwealth, 169 Va. 857, 192 S. E. 795 ..... 14, 26, 37
Youngblood v. Sexton, 32 Mich. 402 25
Ziffrin Inc. v. Martin, 24 F. Supp. 924 9
Ziffrin Inc. v. Reeves, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128 9

STATUTES CITED.

Constitution of the United States, Article I, Section 8, Clause 3 11
Michie's Virginia Code of 1942, Section 4675 (49a), Acts of 1936, p. 434 4

Regulations of Virginia Alcoholic Beverage Control Board passed pursuant to the above Act, Order No. A-1, adopted August 30, 1940, Section 42 5

Same, Section 44 6

Page

Reed Amendment, Act of Congress March 3, 1917, 39 Stat. 1069, 27 U. S. C. A. 123 10

Twenty-First Amendment to the Constitution of the United States, U. S. C. A. Amend XXI, Sec. 2, p. 1038 11

Webb-Kenyon Law, Act of Congress March 1, 1913, 37 Stat. 699, 27 U. S. C. A. 122 9

Wilson Act, Act of Congress August 8, 1890, c. 728, 26 Stat. 313, 27 U. S. C. A. 121 8

SECONDARY AUTHORITIES CITED.

Congressional Record, 49, Parts 1, 3 and 5, 62nd Cong. 3rd Session. House Committee Report No. 1461, 62nd Congress, 3d Session 9

The Law of Intoxicating Liquors, Woolen & Thornton, Sec. 318 24

BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 134.

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE,
Appellants,

v.

THE COMMONWEALTH OF VIRGINIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

BRIEF OF APPELLANTS.

To the Honorable, the Chief Justice of the United States and the Justices of the Supreme Court of the United States:

The Appellants submit this, their brief, in support of their appeal heretofore granted by this Court.

1.

This is an appeal from a final judgment and decree of the Supreme Court of Appeals of Virginia, rendered on March 8, 1943. The opinion of that Court in this cause is found in the official reports thereof in 181 Va. 306, and the same is also reported in 24 S. E. (2) 569.

2.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked upon the ground that the Supreme Court of Appeals of Virginia has sustained a statute and certain regulations promulgated by the Virginia Alcoholic Beverage Control Board pursuant thereto against the contention that the statute and regulations are repugnant to and in conflict with Article 1, Section 8, Clause 3 of the Constitution of the United States.

3.

STATEMENT OF THE CASE.

Appellants were apprehended and arrested in Virginia while operating a truck owned by one Healton Miller, of Winston-Salem, North Carolina. The truck contained a shipment of whiskey which had originated in Maryland and was destined and consigned to a person in North Carolina. None of the whiskey was intended to be diverted into any channels in Virginia. When arrested the Appellants exhibited to the officers a bill of lading containing the name of a lawful consignor, but the consignee, under the laws of North Carolina, was not authorized to receive the shipment. The bill of lading contained no designation of the route to be traveled by the truck while passing through Virginia. Healton Miller, the owner of the truck, had previously complied with one of the regulations in question (Regulations of Virginia Alcoholic Beverage Control Board, Section 42) by posting the required bond with approved surety, but prior to the time of the arrest the Virginia Alcoholic Beverage Control Board had cancelled the bond upon "information" that Healton Miller had the reputation of being a bootlegger in North Carolina, without any evidence of any violation of the laws of Virginia.

The warrant issued against Appellants charged them with violating Section 49a of the Alcoholic Beverage Control Act of Virginia and Sections 42 and 44 of the Regulations of the Virginia Alcoholic Beverage Control Board promulgated pursuant to the provisions of said statute, in that: (1) they had failed to post the required bond; (2) the bill of lading did not specify the route to be traveled through Virginia; and, (3) the consignee named on the bill of lading had no legal right to receive the shipment. (See "Criminal Warrant" R. 25, 26).

Appellants were tried and found guilty by the Trial Justice of Rappahannock County, Virginia, who imposed fines of fifty dollars and costs upon each of the Appellants (R. 26).

Appellants duly perfected their appeal from the judgment of the Trial Justice to the Circuit Court of Rappahannock County (R. 27).

The case was tried in the Circuit Court upon an agreed stipulation of facts (R. 33-36). The constitutional questions involved here were duly raised upon a motion to strike out the evidence and dismiss the warrant (R. 36-37), and, after judgment, upon a motion for a new trial (R. 37). The Circuit Court overruled said motions and entered final judgment of conviction, imposing fines of fifty dollars and costs on each of the Appellants (R. 31-32).

An appeal to the Supreme Court of Appeals of Virginia was duly perfected and on March 8, 1943, an opinion and final judgment were rendered, affirming the judgment of the Circuit Court (R. 38-42).

An appeal from the judgment of the Supreme Court of Appeals of Virginia to this Court has been perfected, and on October 11, 1943, this Court ordered that the further consideration of the question of jurisdiction was postponed to the hearing on the merits (R. 53).

4.

ASSIGNED ERRORS WHICH ARE INTENDED TO BE URGED.

Appellants intend to urge Assignments of Error Nos. 2, 3, 4, 5, 6 and 7, as set forth in their Assignment of Errors (R. 46-49). In the belief that a more logical and concise sequence may be thus presented, in our argument we have divided the questions to be decided into four main topics, numbered I, II, III and IV. For this purpose we have treated Assignment of Error No. 2 under Topic No. 1; we have combined Assignments of Error Nos. 4 and 5, under Topic No. II; we have treated Assignment of Error No. 3 under Topic No. III; we have treated Assignment of Error No. 6 under Topic No. IV; and have treated Assignment of Error No. 7 under each of the several Topics as it relates thereto.

5.

ARGUMENT.

The challenged statute and regulations promulgated pursuant to the authority thereof are as follows:

Section 49-a of Alcoholic Beverage Control Act of 1936 Michie's Va. Code of 1942, Sec. 4675 (49a).

> "Section 4675 (49a). *Transportation; transportation permits; penalties.*—The transportation of alcoholic beverages, other than wine and beer, purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia, in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act within, into or through Virginia in quantities in excess of one gallon, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675 (62). (1936, p. 434.)"

Regulations of Alcoholic Beverage Control Board, Section 42 (Order No. A-1, Aug. 30, 1940).

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act, as Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alco-

holic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

Regulations of Alcoholic Beverage Control Board. Section 44 (Order No. A-1, Aug. 30, 1940).

"Section 44. Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment, signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or other memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writ-

ing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

The general question involved here is the constitutionality of a Virginia Statute in so far that it sanctions certain regulations promulgated by the Virginia Alcoholic Beverage Control Board pursuant to the provisions thereof. These regulations govern and control all through interstate shipments of liquor and contain provisions for penalties for violation thereof.

The statute empowers the Board to promulgate regulations having the force and effect of law for the purpose of controlling the transportation of intoxicating liquor "within, into or through" Virginia. Pursuant thereto, the Board promulgated the regulations complained of in this case. We contend that these regulations, whether considered individually or collectively, are unconstitutional in that each or all of them violate the commerce clause of the Constitution of the United States, by regulating interstate commerce or placing an undue burden thereon.

In approaching this argument we think it proper to first review the authorities and ascertain the law as to the power of a state to regulate a shipment of whiskey originating elsewhere and merely passing through the state, destined to another state; and the limitations of such power, if any.

We shall treat the subject under two headings: first, with respect to the effect of congressional legislation and constitutional amendment thereon; and, second, the judicial definitions of the effect of the commerce clause of the constitution upon the power of states to regulate such interstate shipments.

FIRST.

The Effect of Congressional Enactment and Constitutional Amendment.

(a) The Wilson Act.

Prior to 1890 there seems to have been no congressional legislation on the subject, but in that year Congress enacted the Wilson Act, providing that liquor transported into a state should, upon arrival, be subject to the laws of such state as though produced therein, even though such liquor might be in its original package. (August 8, 1890, c. 728; 26 Stat. 313; 27 U. S. C. A. 121). This Act was not repealed by the Eighteenth Amendment or the National Prohibition Act and is still in force. *Premier-Pabst Sales Co.* v. *McNutt* (D. C. Ind., 1935) 17 Fed. Suppl. 708.

The primary object of this law was to attach the prohibitory laws of the states to liquors the moment they were delivered to the consignee therein, even though the liquors were contained in their original packages. The states could then forbid the sale of such liquors. This law created no new power in the state but placed imported liquors under the same laws as those of domestic origin. *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 17 S. Ct. 45, 49 L. Ed. 925; *Crescent Liquor Co.* v. *Platt* (C. C. W. Va. 1906) 148 F. 894; *Ex Parte Jervey* (C. C. S. C. 1895), 66 F. 957.

The Act created no new power in the State, and was not intended to and did not subject interstate shipments while in transit to state regulation or control. Shipments were not subject to the local law until they arrived at the point of destination and delivery was made to the consignee. *Crescent Liquor Co.* v. *Platt, supra; Rhodes* v. *Iowa*, 170 U. S. 412; 42 L. Ed. 1089; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572; *Pabst Brewing Co.* v. *Crenshaw, supra; Adams Express Co.* v. *Kentucky* (No. 1), 214 U. S. 218, 29 S. Ct. 633, 53 L. Ed. 972; *Rossi* v. *Pennsylvania*, 238 U. S. 62, 35 S. Ct. 677, 59 L. Ed. 1201.

(b) *The Webb-Kenyon Act.*

The Webb-Kenyon Act was enacted by Congress on March 1, 1913 (37 Stat. 699, 27 U. S. C. A. 122). It prohibited the transportation of liquor into a state when such liquor was to be used in violation of the laws of that state. This statute was re-enacted by the Act of August 27, 1935, c. 740 (49 Stat. 877) without any change in the language thereof.

The purpose of this Act as clearly appears from the hearing, debates and reports on the bill was to avoid the narrow construction placed upon the Wilson Law and to permit the local law to operate upon shipments of liquor brought into the State upon their arrival at the State line rather than after delivery to the consignee. (*49 Cong. Rec., Pts. 1, 3 and 5, passim, 62nd Cong., 3rd Sess., esp. Pt. 3 p. 2796 ff.; House Committee Report No. 1471, 62nd Cong., 3rd sess.*)

It deals wholly with importation and does not give states the right to enact legislation pertaining to exportation of liquors. *Ziffrin, Inc.* v. *Martin* (D. C. Ky. 1938) 24 F. Supp. 924; *Ziffrin, Inc.* v. *Reeves*, 1940, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128.

Reading the Act in the light thrown upon it by the Wilson Law and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Law; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws. *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311; 61 L. Ed. 326.

"That the Act did not assume to deal with all interstate shipments of liquor is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the Act to develop." *Adams Express Co.* v. *Kentucky* (No. 2), 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267.

Since the Act specifies the character of the shipment designed to be taken from under the protection of the federal constitution, that is, liquors intended to be received, possessed, sold, or in any manner used in violation of any law of a state, it was manifestly not the intention of Congress to remove this protection from any other character of shipment. *Commonwealth* v. *White*, 166 Ky. 528, 179 S. W. 469; *Van Winkle* v. *State*, 4 *Boyce* 578, 91 Atl. 385; *Ex parte Peede*, 75 Tex. Cr. R. 247, 170 S. W. 749.

A state statute regulating interstate shipments of liquors that are not "intended by any person interested therein, to be received, possessed, sold, or in any manner used, * * * in violation of any law of such state" is therefore not authorized by the Act. *Commonwealth* v. *White, supra.*

The Supreme Court of Appeals of the Commonwealth of Virginia has heretofore given this construction to the Webb-Kenyon Act. In its opinion in the case of *Martin* v. *Commonwealth*, 126 Va. 715, 100 S. E. 836, the court says that neither the Wilson Act nor the Webb-Kenyon Act "contain any suggestion that a state law can operate upon intoxicating liquors as a subject of interstate commerce while being transported through such state."

Applying these constructions of this Act, while it may be true that the Act might apply to the shipment in question if and when it entered North Carolina, it could not be construed to authorize the Virginia Statute in question here.

(c) *The Reed Amendment.*

On March 3, 1917, Congress enacted what is known as the Reed Amendment (27 U. S. C. A. 123; 39 Stat. 1069, ch. 162; Comp. Stat. 1918, 8739A repealed June 25, 1936, ch. 815, Sec. 9, 49 Stat. 1930) prohibiting and imposing a penalty for transporting liquor in interstate commerce into a state which prohibits the manufacture or sale therein of intoxicating liquor for beverage purposes. This court construed this act to exclude liquor transported through

a state as a mere incident to transportation into another state. *United States* v. *Gudger*, 249 U. S. 373, 39 S. Ct. 323, 63 L. Ed. 653.

(*d*) *The Twenty-First Constitutional Amendment.*

The Twenty-First Amendment (U. S. C. A. Amend XXI, Sec. 2, p. 1038) provides:

> "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The history of this section of the Amendment clearly shows that its only purpose was to preserve to the states the same power given to them by Congress under the Webb-Kenyon Act. The dry states were fearful that Congress might, at some future time, repeal the Webb-Kenyon Act and they demanded that the protection afforded them by that Act be written into the fundamental law.

It simply confirmed the Webb-Kenyon Act, *Premier-Pabst Sales Corporation* v. *Grosscup*, D. C. Pa. 1935, 12 F. Supp. 970, affirmed 298 U. S. 226, 56 S. Ct. 754, 80 L. Ed. 1155, and its purpose was to make it impossible for Congress to permit the transportation or importation of intoxicating liquors into any State for use therein in violation of the laws of the state by a repeal of the Webb-Kenyon Act. *Joseph Triner Corporation* v. *Arundel*, D. C. Minn. 1935, 11 F. Supp. 145 reversed on other grounds 304 U. S. 401.

The language of section 2 so closely follows that of the Webb-Kenyon Act as to lead to the conclusion that it was copied therefrom and should receive the same construction. *Dugan* v. *Bridges*, D. C. N. H. 1936, 16 F. Supp. 694, appeal dismissed, 300 U. S. 684, 57 S. Ct. 668, 81 L. Ed. 887.

The words "transportation" and "importation" as used

in the Amendment are to be taken in their ordinary sense and are not to be given any technical meaning. "Importation" consists in bringing an article into a state from the outside. *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894. Such a construction gives to the Amendment the same effect had by the Webb-Kenyon Act, that is, to withdraw from the operation of the commerce clause intoxicating liquor when transported or imported "into" a state "for delivery or use therein * * * in violation of the laws thereof * * *" *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391; 59 S. Ct. 254, 83 L. Ed. 243. *Dunn* v *U. S.*, C. C. A. 10th Cir., 98 F. (2d) 119; *General Sales & Liquor Co. v. Becker*, D. C. Pa. 1936, 14 F. Supp. 348.

As was said by Mr. Chief Justice White, in the case of *United States* v. *Gudger*, supra, in construing similar language contained in the Reed Amendment:

> "Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any state or territory the laws of which state or territory prohibit the manufacture,' etc., includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning which would, however, be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into', as used in the statute, refers to the state of destination, and not to the means by which that end is reached, the movement through one state as a mere incident of transportation to the state into which it is shipped."

There is no substance in any contention that the Amendment gives to the states complete and exclusive control over commerce in intoxicating liquors. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 59 S. Ct. 804, 83 L. Ed. 1189.

Like the Webb-Kenyon Act the Amendment is not a penal provision and it is not self-executing. *Dunn* v. *U. S.*, supra.

Under both the Webb-Kenyon Act and the Twenty-first Amendment intoxicating liquor retains its status as a legitimate subject of interstate commerce until it is imported into a state in violation of a law of the state prohibiting or regulating its importation for use in the state. *Premier-Pabst Sales Corporation* v. *Grosscup*, supra. Its status is determined by two circumstances. First, there must be a law of the state prohibiting or regulating the importation. Second, the importation must be "into" the State "for delivery or use therein." Otherwise the shipment continues to be a legitimate subject of interstate commerce so far as to preclude any action by the state in reference thereto regardless of its possible status when introduced into other states during the course of the interstate transportation. In other words, its status during the course of a continuous transportation through a state is not affected by a status it may acquire in the future because of its introduction into another state in violation of laws of that state enacted under the authority of the Amendment.

The Amendment does not have the effect of reaching out throughout the whole of the United States so as to bring within its purview all liquors possessed anywhere in the United States by any person possessing the goods with an intention to introduce them into some one of the states in violation of its law. To be sure, persons and property may be subjected to the penalties of law where the property is possessed with an intention to devote it to an illegal use. See *Lilienthal* v. *U. S.*, 97 U. S. 237, 24 L. Ed. 901; *Goldsmith Grant Co.* v. *U. S.*, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376. But to construe the Twenty-First Amendment as having any such operative force is to extend its scope and to write therein words that it does not contain. *United States* v. *Gudger, supra.*

The Supreme Court of Appeals of Virginia has heretofore taken our view of the force and effect of the Amendment. In two opinions, *Williams* v. *Commonwealth*, 169 Va. 857, 192 S. E. 795 and *Surles* v. *Commonwealth*, 172 Va. 573, 200 S. E. 636, considered by the court in its opinion in *Dickerson* v. *Commonwealth*, 181 Va. 313, 24 S. E. (2) 550, to have been overruled by decisions of this Court, it was held that the Amendment does no more than withdraw the protection of the commerce clause from liquors imported into a state for delivery or use therein in violation of its law.

In his concurring opinion in the case of *Duckworth* v. *State of Arkansas*, 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294, Mr. Justice Jackson disagreed with the majority opinion, concurred in by all the remaining members of the court, saying that the constitutionality of the Arkansas Statute in question there should be sustained as being authorized by the Twenty-First Amendment.

It seems to be his opinion that the Twenty-First Amendment delegated to the states certain power to *control* through interstate shipments of liquor. We respectfully submit that the language of the Amendment permits of no such construction and that the authorities which we have cited are correct in their answer to this question. The majority opinion in the case announced by Mr. Chief Justice Stone was to the effect that the Amendment had no application, citing *U. S.* v. *Gudger*, *supra*.

From the foregoing considerations contained in this phase of the argument, our conclusion is that neither the several acts of Congress nor the Twenty-First Amendment have application to the case at bar, i. e., the transportation of whiskey through a state en route to its destination in another state and that this shipment of liquor may be regulated by the state through which it is being transported and restricted only in conformity with the commerce clause of the Constitution.

SECOND.

Judicial Definition of the Powers of the States Over Interstate Shipments of Intoxicating Liquors.

Undoubtedly alcoholic beverages are a proper subject of interstate commerce and state regulations which directly interfere with their transportation in interstate commerce (beyond that permitted by the Wilson Act, the Webb-Kenyon Act and the Twenty-First Amendment, all supra) are in contravention of the commerce clause of the Constitution of the United States, regardless of the desirability of the regulations from the standpoint of local interest. *Rossi* v. *Pennsylvania, supra, Kirmeyer* v. *Kansas,* 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721; *Leisy* v. *Hardin,* 135 U. S. 100, 34 L. Ed. 393; *Bowman* v. *Chicago & N. W. Ry. Co.,* 125 U. S. 465, 31 L. Ed. 700; *Louisville & Nashville Railroad Co.* v. *W. F. Cook Brewing Co.,* 223 U. S. 70, 36 L. Ed. 355; *Adams Express Co.* v. *Commonwealth of Kentucky* (No. 1), *supra.*

As was said by Mr. Justice White in the case of *Vance* v. *W. A. Vandercook & Co.,* 170 U. S. 438, 42 L. Ed. 1100:

> "Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

In the case of *Duckworth* v. *State of Arkansas, supra,* Mr. Chief Justice Stone had occasion to review the authorities and to define the extent to which a state might go in enacting regulations affecting interstate commerce, saying:

> "While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulat-

ing matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court; notwithstanding the commerce clause. See *California* v. *Thompson*, 313 U. S. 109, 113, 61 S. Ct. 930, 932, 85 L. Ed. 1219, et seq. and cases cited. See also cases collected in *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 39, 40, 47 S. Ct. 267, 270, 71 L. Ed. 524, and in *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188, Note 5, and 191, 58 S. Ct. 510, 515, 517, 82 L. Ed. 734.

"In the cases referred to the Court has sustained a variety of local regulations designed to safeguard the states from injurious local effects that may attend interstate transportation. Familiar examples are inspection and quarantine laws for the protection of local health and safety, applicable to persons, animals, and merchandise moving in interstate commerce. Again, a state may insure the safe and convenient use of its harbors and navigable waterways by controlling the movement of vessels in interstate and foreign commerce; in the interests of safety it may control the operations of interstate trains and of their employees and appliances.

"Of recent years the Court has sustained state regulations of the size and weight of motor cars moving interstate, designed to insure the safe and economical

use of the States' highways. *South Carolina Highway Dept.* v. *Barnwell Bros., supra*, and cases cited. A state may police "caravan" of motor vehicles moving over its highways in interstate commerce and charge a compensatory license fee for doing it. *Morf.* v. *Bingaman*, 298 U. S. 407, 56 S. Ct. 756, 80 L. Ed. 1245; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001. It may, in the interest of public safety and convenience, restrict particular types of motor vehicles moving in interstate commerce to particular areas. *Sproles* v. *Binford*, 286 U. S. 374, 393-395, 52 S. Ct. 581, 586-588, 76 L. Ed. 1167; cf. *Clark* v. *Paul Gray, Inc.*, *supra*, 306 U. S. 598, 59 S. Ct. 752, 753, 83 L. Ed. 1001. And a state may undertake to insure the fitness and integrity of those negotiating contracts for interstate transportation, by licensing them and requiring a bond to insure their good behavior. *California* v. *Thompson*, *supra*."

In the case of *California* v. *Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 the opinion was also written by Mr. Chief Justice Stone. This case, in effect, overruled the majority decision in the case of *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 525, and adopted the dissenting opinion of Mr. Justice Stone and Mr. Justice Brandeis. In the former case the court laid down the test to be applied as whether upon a "consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines."

A state may not, however, under the "cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." *Hannibal & St. J. Railroad Co.* v. *Husen*, 95 U. S. 465, 24 L. Ed. 527. It may not deny to motor vehicle carriers engaged exclusively in transporting liquors in interstate commerce through the state

the right to use its roads where the denial has no relation to public safety or the local public interest. *Buck* v. *Kuykendall*, 267 U. S. 307. 45 S. Ct. 324, 69 L. Ed. 623; *Bush & Sons Co.* v. *Malloy*, 267 U. S. 317, 45 S. Ct. 326, 69 L. Ed. 627; *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed., 445; *Bradley* v. *Public Utilities Commission of Ohio*, 289 U. S. 92, 53 S. Ct., 577, 77 L. Ed. 1053; *Liberty Highway Co.* v. *Michigan Public Utilities Commission*, D. C. Mich., 294 F. 703; *Red Ball Transit Co.* v. *Marshall*, D. C. Ohio, 8 F. (2d) 635.

From these authorities we conclude that the commerce clause does not preclude the several states from enacting and enforcing regulations governing through interstate transportation of intoxicating liquors, if such regulations are reasonably designed to safeguard the local public interests, and do not constitute an undue burden upon the commerce; but the state may not prohibit such transportation altogether nor regulate it in such a manner as to place an undue burden upon it.

In the case of *Johnson* v. *Yellow Cab Transit Co.*, 137 F. (2d), 274 U. S. Circuit Court of Appeals, Tenth Circuit, rendered July 26, 1943, Judge Phillips, in discussing the effect of the Twenty-first Amendment as well as the judicial definition of the regulatory powers of the states over through interstate transportation of liquor, used language which we deem to be most pertinent to the problem here when he said:

> "Oklahoma has power under the Twenty-first Amendment to forbid all importations of intoxicating liquor *into* the state or to adopt a lesser degree of regulation than total prohibition. It may also require a permit for the transportation of intoxicating liquor in interstate commerce through the state *as a means of establishing the identity of those who engage in such transportation and their routes and points of destination and of enabling local officers to take appropriate measures to insure transportation without diversion.*" (Citing Duckworth v. Arkansas, supra) (Italics supplied).

Again, in the same case, Judge Bratton in his concurring opinion says:

> "And it (the state) may impose reasonable regulations intended to safeguard the movement of such liquor in interstate commerce through the state, provided they do not constitute a substantial burden on such commerce. (Citing Duckworth v. Arkansas, supra) *But a state has no power to forbid the transportation in interstate commerce of intoxicating liquor through its territorial boundaries.* (Citing United States v. Gudger, and Williams v. Commonwealth, both supra). *And that is true even though the shipment is enroute to a destination where the manufacture and sale of such such liquor is prohibited by state law.* McCanless v. Graham, 177 Tenn. 57, 146 S. W. (2d) 137; Barnett v. State, 243 Ala. 410, 9 So. (2d) 267." (Italics supplied.)

As we have seen, liquor is a subject of lawful interstate commerce. Its transportation through a state involves no more local public concern or interest than such transportation of any other commodity, with the *sole exception* that the state is interested in preventing its diversion into channels within the state in violation of state laws. The state is not concerned with the shipment before it enters the state or after it leaves the state. Any regulations not reasonably designed to prevent such diversion into state channels would be violative of the commerce clause; and, even though the regulations might be so reasonably designed, yet if they materially interfered with or constituted an undue burden upon the free flow of such shipments they would still be violative of the commerce clause.

Applying these premises to the regulations in question here we shall discuss them under the various topics as hereinbefore indicated in order to ascertain whether or not they are violative of the commerce clause.

TOPIC I (Assignment of Error No. 2)

The Requirement That the Transporter Designate Upon the Bill of Lading the Route to be Traveled Through Virginia which Must be the Most Direct from the Consignor's Place of Business to the Place of Business of the Consignee. (Va. A. B. C. Board Reg. Sec. 44 (a) and (b).)

There is, of course, no objection to the requirement that a proper bill of lading accompany each shipment; and it may be that under the decision in the case of *Duckworth v. State of Arkansas*, supra, a requirement that the route to be traveled while in Virginia be specified would be valid and constitutional; but such is not the case here, for this regulation greatly increases the burden on the transporter by requiring him to specify a route which is the most direct from the place of business of the consignor to the place of business of the consignee.

In order to comply with this regulation the transporter must first ascertain the most direct route. He must avail himself of a road-map and sketch out roughly the most direct route from the consignor to the consignee. When only one state is to be traversed, this might not be such a serious problem. But, suppose that he must travel from Maine to Florida, or from New York to California. Unless the most direct route carried him through Virginia, he could not pass through any portion thereof, regardless of the desirability of such routing from an economic or any other standpoint. In addition, he could never be certain that the route chosen was the most direct.

Confining the problem to the instant case, the road-map would only designate the main highways, and what might on the map appear to be the most direct route, would not in fact be such. Virginia is interlaced with numerous hard-surfaced secondary highways, not shown on the road-maps, or on any others except certain local county maps.

The transporter would be forced to examine all available maps and other information and then he could never be absolutely certain that the route selected would be the most direct. There might well be some country dirt roads or lanes which would be more directly in line between the consignor and consignee. In 1939 the Supreme Court of Appeals of Virginia, in holding this regulation to be unconstitutional as violative of the commerce clause in the case of *Surles* v. *Commonwealth*, supra, said:

> "It may be true, and doubtless is that no great burden would have been imposed had these defendants been asked to indicate the route which they would take, but if some farmer in Maine wished to send a truckload of seed potatoes to California, and if Statutes like ours were everywhere in force, he would find it burdensome to work out in advance the route to be traveled; *indeed he might find it impossible.*" (Italics supplied).

The most direct route might be the most hazardous and costly. It is so often true, especially in Virginia, that the most direct route would involve climbing mountains and/or traveling over poorly constructed and maintained roads; while another somewhat longer route would take the transporter over smooth, flat highways, thereby involving a saving of time and manpower as well as of wear and tear on tires and machinery, and in the consumption of gasoline. Our transporter, however, would have no election but must choose the mountainous route.

Transporters carrying mixed cargoes are confronted with insurmountable difficulties. Suppose, in addition to a consignment of liquor, the carrier desires to transport other items to various points in Virginia as well as other States. He could not transport these other items unless the consignees were situated along the shortest route. In effect, this regulation would seem to prohibit the commercial carrier from transporting other commodities in the same vehicle with the consignment of liquor, and this

would greatly affect the profit and economy of the undertaking where a full load of liquor was not consigned.

It is not enough to say that the enforcement officers could accept reasonable excuses for violations or that they could administer the law in a reasonable manner. The Commonwealth under these regulations could exact heavy penalties for the smallest violations.

Not only are these requirements extremely burdensome to the transporter, but they are not reasonably designed to prevent the diversion of whiskey into channels within Virginia, or to prevent violations of its laws by the transporters while within the state. It may be that the designation of the route to be traveled would permit the state officers to ascertain whether there is likely to be a diversion of the cargo and to facilitate surveillance of the vehicle while in Virginia, but what purpose could the requirement that the route be the most direct serve?

The regulation is unreasonable in that it imposes a hardship on the transporter without serving any useful purpose. The decision in the *Duckworth* case, supra, affords the state ample power to police the shipment. Under that decision the state can require the shipper or the transporter to make the application for the permit upon the basis of a specified route to be traveled.

The regulation here is unnecessarily drastic in that it is too broad and seeks to deny interstate transporters the use of some of the roads of the state without any adequate reason based upon the necessity of the case from the standpoint of the protection of the public interest. In that respect it comes within the inhibition of the rule in *Hannibal & St. J. Railroad Company* v. *Husen* and *Buck* v. *Kuykendall*, *supra*.

Certainly this regulation cannot be brought within the language of Mr. Chief Justice Stone in the *Duckworth* case, *supra:*

> "It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the

states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state."

TOPIC II (Assignment of Errors Nos. 4 and 5)

The Requirement of a Bond Subject to Cancellation in the Discretion of the Virginia Alcoholic Beverage Control Board. (Va. A. B. C. Board Regulations, Section 42).

While neither the statute nor the regulations contain any express provision for the cancellation of any bond posted pursuant thereto, the Supreme Court of Appeals of Virginia in the instant case construed the statute and regulations to impliedly authorize the Board to cancel such bond in its discretion, saying:

> "The requirement for the posting of a bond is a regulation of a police nature. The Board having the authority to require the bond, under the police powers conferred upon it by the A. B. C. Act, had the right to cancel it with or without notice under the same power if, in the exercise of a reasonable discretion, it was satisfied that it was being used or about to be used against the public safety and welfare."

While we do not entirely agree with the Virginia Court in its construction of the law, it is an invariable rule that the Supreme Court of the United States will adopt and follow the State Courts of last resort in the construction of their own statutes. *Gatewood* v. *North Carolina*, 203 U. S. 531, 27 S. Ct. 167, 51 L. Ed. 305; *Fairfield* v. *County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544; *Polk* v. *Wendal*, 9 Cranch. 87; *Nesmith* v. *Shelbon*, 7 How. 812; *Walker* v. *Harbor Comr's*, 17 Wall. 648.

The authority of the Board to cancel the bond at will, in the exercise of its discretion, carries with it the power to deny to any one the right to transport liquor through Virginia for any reason.

The real effect of such a requirement is that the bond constitutes a license revocable on the part of the Board in its discretion.

The right of a citizen to carry on interstate commerce is not a franchise or privelege granted by the state but is a right conferred by the Constitution which every citizen of the United States is entitled to exercise under the laws of the United States. *Crutcher* v. *Kentucky,* 141 U. S. 47, 35 L. Ed. 649. A state law which denies such right, or substantially burdens or interferes with it is in conflict with the Constitution of the United States. *Vance* v. *W. A. Vandercook* (No. 1), *supra.*

This court has repeatedly declared that a state law is unconstitutional which requires a party to take out a license for the carrying on of interstate commerce, no matter how specious the pretext may be for imposing it. *Crutcher* v. *Kentucky, supra; Pickard* v. *Pullman Southern Car Co.,* 117 U. S. 34, 29 L. Ed. 785; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 30 L. Ed. 694; *Asher* v. *Texas,* 128 U. S. 129, 32 L. Ed. 368; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 32 L. Ed. 637; *McCall* v. *California,* 136 U. S. 104, 34 L. Ed. 391; *Norfolk & Western Railroad Co.* v. *Pennsylvania,* 136 U. S. 114, 34 L. Ed. 394.

Where a transportation of alcoholic beverages in interstate commerce has not been withdrawn from the operation of the commerce clause by the Webb-Kenyon Act and the Twenty-First Amendment this rule prevails and a state cannot make the right of the transporter to transport dependent upon the granting by it of a license.

A license is a permit to do business that cannot be done without it. It is synonymous with "authority" or "permission" and is essentially a grant to those to whom it is given or extended not enjoyed by persons generally. It is a grant by some competent authority to do an act which without such authority would be illegal. The object is to confer a right that does not exist without the license and a common right is not the creation of a license. Woolen & Thornton

on "The Law of Intoxicating Liquors", sec. 318 and cases cited. A license is not a privilege that any citizen may demand. It is in the nature of a favor. *Schweirman* v. *Highland Park*, Ky. 113 S. W. 507.

A license fee or tax is not a part of the license nor is it an inseparable incident thereof. Licenses may be and often are granted without exacting a fee or tax. *Youngblood* v. *Sexton*, 32 Mich. 402.

The very definition of a license makes clear the lack of power in a State to exact it as a condition precedent to the right to transport liquors through a state in interstate commerce. "A power to grant a privilege to one is inconsistent with the possession on the part of another of an absolute right to exercise such privilege." *People ex rel. Schwab* v. *Grant*, 126 N. Y. 473, 27 N. E. 964.

The right of a citizen of another state to transport goods in interstate commerce through the State cannot be held subject to the approval of the Virginia Alcoholic Beverage Control Board without admitting the power of that Board to control the exercise of the right. *Vance* v. *W. A. Vandercook* (No. 1), *supra*.

The name given to an exaction or the form it takes is immaterial and the court in determining its validity will look to its real substance and effect. *Lipke* v. *Lederer*, 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 39 L. Ed. 311.

In its essence the requirement that a person engaged in transporting alcoholic beverages through the state must first post a bond, subject to cancellation as we have seen, constitutes the imposition of a license as a condition precedent to the right to make the transportation. The requirement has all of the characteristics and the operative effect of a license. That this is necessarily so will be readily seen upon an examination of the regulations themselves and of the method and manner in which they were administered by the Board in this case.

The privilege of engaging in interstate commerce is one which the State cannot deny and the effect of the application of the discretion of the Board to the bond requirement is not only to burden interstate commerce but to obstruct it. *Buck* v. *Kuykendall, supra, Bush & Sons Co.* v. *Malloy, supra; Sprout* v. *South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833.

The Supreme Court of Appeals of Virginia has heretofore passed upon this regulation and declared it invalid. In the case of *Williams* v. *Commonwealth, supra*, reaffirming the principles enunciated in *Martin* v. *Commonwealth, supra*, it was held that the provisions of the statute and regulations here in issue when applied to interstate shipments of liquor, not to be delivered or used in Virginia but only passing through the state, were a direct burden on interstate commerce and in contravention of the commerce clause.

In its decision in the instant case the court has overruled its former decision and justifies the imposition on the ground that it "is a regulation of a police nature." But a statute of a state which imposes a direct burden on interstate commerce is not saved by calling it an exercise of the police power. *Charleston & Western Carolina Railway Company* v. *Varnville Furniture Co.*, 237 U. S. 597, 37 S. Ct. 715, 59 L. Ed. 1137; *D. E. Foote & Company, Inc.* v. *Stanley*, 232 U. S. 494, 59 L. Ed. 698.

A State may not interfere with transportation through the State "beyond what is absolutely necessary for its self-protection. It may not under cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce." *Hannibal & St. J. Railroad Company* v. *Husen, supra.*

The error of the Virginia Court appears to be in its assumption that *Ziffrin* v. *Reeves, supra*, and *Duckworth* v. *Arkansas, supra*, govern the case.

The *Ziffrin* v. *Reeves* decision has no applicability whatever to the issues presented here. That decision was predicated upon the right of a state under its plenary police power reserved to it by the Tenth Amendment to control the alcoholic beverage traffic within its territory. The State had the power to regulate her internal affairs notwithstanding an incidental burden on interstate commerce when such regulation was "an inseparable incident of the exercise of legislative authority, which, under the Constitution has been left to the states." This rule was first stated by the Supreme Court in 1852 in the leading case of *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, and has been reaffirmed and restated many times in the intervening years. See *Pervear* v. *Commonwealth*, 5 Wall. 475; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. Ed. 819.

The Virginia Court says that the decision in the *Duckworth* case authorized a state to require a permit for the transportation of liquor in interstate commerce through the state and that evidence of the posting of the bond with the Board constituted a permit. The court is under considerable misapprehension as to the kind and nature of the permit which the Supreme Court countenanced. In the *Duckworth* case this court specifically limited its ruling to a permit which was obtainable upon application and for a nominal fee and where any failure of the issuing officer to act promptly was controllable by mandamus. The exaction was supported because the court found that it did not forbid or preclude the transportation, or materially interfere with the free flow of commerce among the states beyond what was reasonably necessary to protect the local interests. In this respect the court simply applied and followed its previous ruling in *Buck* v. *Kuykendall*, *supra*.

The imposition here is not in the nature of the permit authorized to be exacted by the court in the *Duckworth* case but has all of the characteristics of a type of license which has uniformly been condemned by the court. It would give to the states the power, to control interstate transportation

of liquor, through the exercise of its discretion by an administrative board.

But, says the Virginia Court in this case:

> "It is not to be presumed that the authority of the Board will be arbitrarily used; but in the event that it is abused, a person feeling himself aggrieved may seek judicial relief in the courts." (R. 42)

In other words, the Board will not cancel the bond unless it feels that the transporter is a type of person who might divert the liquor into state channels. The Board may be led to this conclusion by rumors (such as existed in this case) or through any information it may receive no matter how unreliable and regardless of the source. It might well be that a transporter's creed or color would have a pronounced influence upon its decision.

In the opinion of the Virginia court, a person whose bond was thus arbitrarily cancelled could seek "judicial relief in the courts."

The Court probably considered the opinion in the *Duckworth case, supra,* to support such a position, where this court used the following language:

> "It also said that any failure by the state commissioner to act reasonably and promptly in administering the law would be controlled by the courts through mandamus. In a later case, Hardin, Commissioner v. Spiers, 152 S. E. 2d 1010, arising under regulations not in force at the time of appellant's conviction, the same court declared that the commissioner must exercise this power in a reasonable, not an arbitrary manner."

In the *Duckworth* case, *supra*, the transporter was "entitled to a permit on application", and the permit requirement there was in its nature an "inspection measure". The right to mandamus the Commissioner arose when he failed to issue the permit with reasonable promptness. There was no discretionary *right to refuse* to issue the permit. The

situation here is far different. After the bond had been cancelled the transporter would have no right to seek any relief whether judicial or otherwise. He would certainly have no right to mandamus by any court in Virginia directed to the correction of an abuse of the power of the Board, which the Supreme Court of Appeals of Virginia has held in this case to be discretionary. Without exception the Supreme Court of Appeals of Virginia has held that mandamus will apply only to the performance of ministerial duties, and never to question the exercise of a discretionary power. *Ford* v. *Cox*, 165 Va. 239; *Wilder* v. *Kelley*, 88 Va. 274, 13 S. E. 483; *Richmond* v. *Epes*, 98 Va. 233, 35 S. E. 723.

The transporter would have no right to an appeal to any court, because there is none provided under the statute law of Virginia. The action of the Board would be final in every sense of the word, and the effect would be a complete prohibition against the transportation of any liquor through Virginia by the transporter, until or unless the Board chose to rescind its action.

We submit that the regulation in question here is a device which enables the Board to determine who may transport liquor through Virginia; that this power is in effect a licensing power; and that, as we have seen, such regulation is in contravention of the commerce clause of the Constitution.

TOPIC III. (Assignment of Error No. 3)

The Requirement that the Consignee Have a Legal Right to Receive the Shipment at Its Destination.

(Va. A. B. C. Board Regulation, Section 44 (c)).

It is to be noted that violation of this regulation requires no knowledge on the part of the transporter that the consignee has no legal right to receive the shipment. The appellants here are not charged with such knowledge, nor

does the stipulation of facts set forth that they had such knowledge. So far as this case is concerned the appellants are entirely innocent of any intention to violate any law of North Carolina.

However, under the regulation in question, if, for any reason, the consignee has no legal right to receive the shipment the transporter is guilty of a violation. The consignee must have complied with all federal, state, county and municipal laws and regulations affecting his right to receive the shipment. If he has not complied to the letter with all such laws and regulations, even though the transporter has no knowledge thereof, the latter violates the challenged regulation as soon as he enters Virginia.

In order to be certain that he is complying with this Virginia regulation the transporter must familiarize himself with all pertinent federal, state, and local laws and regulations. He must also construe such laws and regulations as they may be applied to the consignee. He must ascertain that the consignee has complied with all licensing requirements. And, even after he has made such an investigation, he must risk the chance that his constructions of the laws and regulations as applied to the consignee are correct. In fact, in this case, he must risk the chance that the Virginia court will not construe the North Carolina law according to his own construction thereof. It may well be that there would be jury issue as to the legal right of the consignee to receive the shipment.

A situation may well exist where the right of the consignee to receive the shipment might change while the goods are in transit. For example, the consignee's license might expire or the laws might change due to legislative enactments or judicial construction.

In short, even though the transporter has borne the heavy burden of investigating the law governing the right of the consignee to receive the shipment, he can never be reasonably certain that he is not violating the Virginia law while transporting the shipment through Virginia.

Of course, if the transporter's vehicle contains various shipments consigned to several consignees, his problem is multiplied by the number of such consignees.

While it is admitted in this case that the consignor had the legal right to make the shipment, it is interesting to note that under the regulation the transporter is confronted with much the same problems with respect to the legal right of the consignor to make the shipment.

Under the limits of the purpose of state regulations of interstate transportation set forth in the *Duckworth* and other cases cited, *supra*, we can conceive of no purpose or design for this regulation other than to prevent persons who may intend to violate the laws of other states from transporting liquors through Virginia, under the theory that persons who are so vile and reprehensible as to violate, *or to contemplate violation of*, the laws of other states are not proper persons to transport liquor through Virginia, in that they might divert the liquor into channels in Virginia in violation of the State laws.

The purpose of this regulation appears to be somewhat similar to that of the bond requirements (discussed under Topic II) that is, to prevent certain types of persons from transporting liquor through Virginia. However, as we have seen, the State has no power to determine who may or may not engage in through interstate transportation of liquor. The licensing power of the State does not extend to through interstate commerce, and, regardless of how praiseworthy the motive, the state may not destroy the right to engage in interstate transportation, nor regulate it more than is reasonably necessary to protect the local public interest.

The next question is whether or not the regulation is reasonably designed to effect the end sought. The hardship is not upon the consignee but upon the transporter, who, as we have seen, is an innocent party. While some transporters who are *in particeps criminis* with the consignee would be precluded, the regulation would affect all trans-

porters, regardless of their knowledge of or intended participation in the violation of the laws of the state to which the liquor might be consigned. The regulation, is, therefore, not reasonably designed to prevent the unlawful distribution or use of the liquor in Virginia.

Upon these considerations we submit that this regulation does not meet the test laid down in the case of *California* v. *Thompson, supra*. Upon a consideration of the facts and circumstances, the character of the business and the actual effect upon the flow of commerce, we are led to the conclusion that the regulation does "infringe the national interest in maintaining the freedom of commerce across state lines".

TOPIC IV. (Assignment of Error No. 6.)

The Cumulative Effect of the Virginia Regulations.

Assuming each of the regulations heretofore discussed to be in itself a valid exercise of the power of the state to enact and enforce regulations affecting interstate commerce, within the limits prescribed by the opinions in the case of *California v. Thompson* and *Duckworth* v. *State of Arkansas*, both *supra*, can it be said that their cumulative effect does not constitute an undue burden upon interstate commerce? Can the state, under the guise of enacting regulations reasonably designed to promote the local public interest, multiply its "reasonable regulations" to the extent that they actually prohibit or substantially interfere with interstate commerce?

In order to obey the regulations in question here the transporter must meet all requirements thereof.

He must post a bond in the penalty of $1,000.00 with approved surety, which bond is subject to cancellation in the discretion of the Board. Evidence that the bond has been posted must accompany each shipment.

He must specify the route to be travelled through Virginia which must be the most direct from the consignor to the consignee. He must not vary from the route specified.

This requirement would of course, apply even though it might be desired to transport in one cargo various shipments of liquor from several consignors to several consignees, all of whom may be situated in various places.

Although such matters are usually of no concern to the transporter, he must ascertain whether or not the various consignors have the legal right to make the shipment and whether or not the various consignees have the legal right to receive the same.

It can readily be seen that these requirements, taken as a whole, have the effect of excluding and prohibiting a substantial portion of through interstate transportation of liquor. From an economic standpoint alone, obedience to the regulations would necessitate the expenditure of time and money on the part of the transporter and thus add to the cost of transportation, even if he were willing to risk the hazard that his conclusion that the consignor and consignee have the legal rights to ship and receive the consignments is correct. This, we submit constitutes an interference with the free flow of transportation of liquor through Virginia, which as we have seen is violative of the commerce clause of the constitution.

As was said by Mr. Justice Jackson in his concurring opinion in the *Duckworth* case, *supra:*

> "Our danger, as the forefathers well knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations. Each may serve some local purpose worthy enough by itself. Congress may very properly take into consideration local policies and dangers when it exercises its power under the commerce clause. But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national society. It is the movement and exchange of goods that sustain living standards, both of him who produces and of him who consumes. This vital national interest in free commerce among the states must not be jeopardized."

The Right of Appellants to Raise the Constitutional Questions.

Mr. Justice Jackson in the *Duckworth* case, *supra,* based his concurring opinion partially upon the ground that since Duckworth admitted that his cargo of liquor was to be sold in violation of the laws of Mississippi, he had no right to question the constitutionality of the Arkansas regulation because one who "assails the constitutionality of a statute must stand on his own right to relief." The purpose of *Duckworth's* trip being to violate the constitution (Amendment XXI) and the laws of Mississippi, he did not come within the class of those who may invoke the constitutional protection.

Applying these observations to this case, the contention would be that, even though the questioned regulations might be unconstitutional as to other transporters of liquor through Virginia, the appellants may not raise the question because after their transportation is complete the liquor transported will fall into hands not entitled to receive it under the laws of North Carolina.

There can be no doubt that one who invokes the protection of the commerce clause must place himself within the class of those whose rights are affected by the challenged state statute. This rule is supported by the authorities cited in the footnotes to Mr. Justice Jackson's opinion, *supra,* as well as others too numerous to mention. *People of State of N. Y. ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 27 S. Ct. 188, 51 L. Ed. 415; *Harneford* v. *Silas Mason Co.,* 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814; *Premier-Pabst Sales Co.* v. *Grosscup, supra.*

We think that Mr. Justice Holmes' opinion in the case of *Hatch* v. *Reardon, supra,* correctly states the law. That case involved the constitutionality of a New York stamp tax on the sales of securities. Reardon sought an injunction against the enforcement of the law on the ground (among others) that it violated the commerce clause. The stock sale involved in the case was purely an intra-state

transaction, but Reardon contended that the well established rule of *U. S.* v. *Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040, enabled him to challenge the constitutionality of the New York statute regardless of whether his particular transaction was in interstate commerce, because the statute might be construed to cover interstate as well as intra-state commerce.

The rule announced in the *Ju Toy* case, *supra*, was that a statute must be valid "as to all that it embraces or altogether void."

Mr. Justice Holmes in the case of *Hatch* v. *Reardon*, *supra*, says that the Ju Toy rule is still the law:

> "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the *tax* laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced the law is incorrect, it is void as to all."

Applying this rule to the instant case; if the appellants had been engaged in *intra-state commerce* they would not be permitted to urge the unconstitutionality of the challenged regulations as affecting *interstate* commerce. However, once they are placed within the category of interstate commerce, they are entitled to attack the regulations *as to all that they embrace*. If the regulations are unconstitutional as to any members of the class of interstate transporters they are invalid as to all. *U. S.* v. *Ju Toy, supra.*

Mr. Justice Jackson seemed to be of the opinion that since Duckworth intended to violate the laws of Mississippi and the Twenty-First Amendment he was not a member of the class entitled to raise any constitutional question.

We do not concede that appellants intended to violate the Twenty-First Amendment or any law of North Carolina, but, assuming that they did, we have seen that the Twenty-First Amendment is not a penal statute nor is it self-executory. It is incapable of violation in itself, and simply enables the states to protect themselves from shipments into their own borders in violation of their laws.

Suppose, however, that the appellants intended to violate the Amendment and the laws of North Carolina, we can find no authority for the proposition that such fact would preclude them from invoking the protection of the commerce clause. In fact the case of *McFarland* v. *American Sugar Refg. Co.*, 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899, cited by Mr. Chief Justice Stone in the majority opinion in the *Duckworth* case, *supra*, supports a contrary view. In the former case Mr. Justice Holmes says:

> "We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprived it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way."

As this proposition was restated by Mr. Chief Justice Stone in the *Duckworth* case, *supra*,

> "We may also assume that appellants' admission (that the liquor was intended for illegal use in Mississippi) no more deprives him of the right to invoke the protection of the commerce clause against the Arkansas Statute than did intended violation by the importer of the liquor laws of the state of destination before the adoption of the Webb-Kenyon Act. * * * and the Twenty-First Amendment."

We, therefore, submit that the appellants have the right to raise the question of the constitutionality of the challenged Virginia regulations in this case.

CONCLUSION.

Prior to the decisions in the cases of *Ziffrin* v. *Reeves* and *Duckworth* v. *Arkansas*, both *supra*, the Supreme Court of Appeals of Virginia was of the opinion that the questioned regulations were violative of the commerce clause. *Surles* v. *Commonwealth* and *Williams* v. *Commonwealth*, both *supra*. The only reasons for that court's reversal of its former opinion were the opinions of this court in the *Ziffrin and Duckworth* cases. In the case of *Dickerson* v. *Commonwealth*, *supra*, involving essentially the same problems as those of the instant case and decided the same day, the court (referring to the *Ziffrin* and *Duckworth* cases) says:

> "We are bound by the judicial construction placed upon the provisions of the Constitution by the Supreme Court of the United States."

The Virginia Court gave weighty consideration to the language of the *Ziffrin* case where this court said:

> "Without doubt a state may *absolutely prohibit* the manufacture of intoxicants, their *transportation*, sale, or possession, irrespective of when or where produced or *obtained*, or the use to which they are to be put." (Italics supplied.)

The Virginia court seemed to believe that this language referred to through interstate transportation such as exists in the instant case. We submit that this language in the *Ziffrin* case should be construed in the light of its facts, and that it was intended to apply only to shipments of liquor originating in Kentucky destined to another state in interstate commerce, and not to through interstate shipments such as the one under consideration here.

The Virginia court also seemed to be of the opinion that the *Duckworth* decision empowered the state to enact any regulation so long as it "does not interfere with *lawful* interstate transportation." (Italics supplied.) We take it that the court means that any regulation is valid if the ship-

ment is involved in any infraction of the law outside Virginia, and, that, if such is the case, Virginia can regulate in any manner that she sees fit. For the reasons stated, we submit that this is not the law.

The Virginia Court in the instant case has extended the rule of the *Duckworth* case far beyond our conception of the intention of this court as expressed in that opinion. The bond with its cancellation feature is far more than an "inspection measure" or a "means of establishing the identity of those who are to engage in the transportation." The most direct route requirement is more than a means of establishing the "route and destination" of the shipment. The unlawful consignee feature is without any parallel in the *Duckworth* case, or any other authority. In short, the regulations are not reasonably designed to insure that the liquor "is transported without diversion, and "precludes" or "interferes with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state."

Respectfully submitted,

R. E. JOYCE,
JOHN S. BATTLE,
AUBREY G. WEAVER;
Counsel for Appellants.

SUBJECT INDEX

	Page
Opinion Below	1
Grounds for Jurisdiction	2
Statement of the Case	2
Questions Presented	4
Summary of Argument	5
I. The Virginia System of Liquor Control Requires, for Protection of State Revenues and the Public Welfare, That Unlawful Traffic in Alcoholic Beverages Be Suppressed	7-10
II. In the Absence of the Exercise By Congress of its Power to Regulate the Transportation by Motor Vehicle of Alcoholic Beverages in Interstate Commerce over the Highways of the State, a State May Regulate Such Transportation, and May Adopt Appropriate Measures to Prevent the Unlawful Diversion, Delivery, or Use of Such Beverages within its Borders	10-12
III. The Court Will not Strike Down Nondiscriminatory State Regulations Intended to Confine the Interstate Movement of Alcoholic Beverages within Legitimate Channels unless the Court Can Say that the Regulations Are not Supported by Any Reasonable or Rational Basis	12-15
IV. The Requirement of Regulation No. 42 with Respect to the Posting of a Bond Having the Effect of a Permit to Transport Alcoholic Beverages through the State Is a Reasonable and Appropriate Measure to Prevent Unlawful Diversion, Delivery or Use within the State. That the Permit Shall Be Revocable for Good Cause Is not an Unreasonable Condition	15-22
V. The Requirement of Regulation No. 44 that a Bill of Lading or Memorandum of Shipment Shall Accompany	

SUBJECT INDEX—*Continued*

Page

the Transportation, Showing the Highway Route to Be Traveled, and that said Route Be the Most Direct to the Point of Destination, Is a Reasonable and Appropriate Measure to Prevent the Unlawful Diversion, Delivery or Use of such Beverages within the State 22-25

VI. The Requirement that the Consignee, Named in the Bill of Lading, Be a Person who Has a Legal Right to Receive Delivery of the Alcoholic Beverages in the State of Destination Is a Reasonable and Appropriate Measure to Prevent Their Unlawful Diversion, Delivery or Use within the State of Virginia 25-27

VII Should the Court Be of Opinion that the Challenged Regulatory Provisions Are not within the State's Retained Power to Regulate the Transportation of Intoxicating Liquors in Interstate Commerce, such Regulations Are a Valid Exercise of the Power of the State Derived from the Twenty-first Amendment 27-30

VIII. The Appellants, Having Admitted as a Fact that They Were, at the Time They Were Apprehended, Engaged in Transporting Alcoholic Beverages into North Carolina, in Violation of the Laws of that State and of the Constitution of the United States, Are without Standing in Court to Challenge Virginia's Regulation of Their Actions 30-32

Conclusion 32

Appendix 33-36

Section 49-a of Alcoholic Beverage Control Act of 1936, Michie's Va. Code of 1942, Sec. 4675 (49a) 33

Regulations of Alcoholic Beverage Control Board, Sec. 42 (Order No. A-1, Aug. 30, 1940) 34

Regulations of Alcoholic Beverage Control Board, Sec. 44 (Order No. A-1, Aug. 30, 1940) 35

TABLE OF CITATIONS

Page

California v. Thompson, 313 U. S. 109.....10, 21, 26

Dickerson v. Commonwealth, 181 Va. 313, 24 S.E. (2d) 550.....1, 10

Duckworth v. Arkansas, 314 U. S. 390.....10, 13, 14, 21, 27, 28, 30, 32

Henneford v. Silas Mason Co., 300 U. S. 577, 583..... 32

New York, ex rel Hatch v. Reardon, 204 U. S. 152, 160..... 32

Premier Pabst Sales Co. v. Grosscup, 298 U. S. 226, 227..... 32

South Carolina State Highway Department v. Barnwell, 303 U. S. 177 .....10, 12

Wickard v. Filburn, 317 U. S. 111, 87 L. Ed. 57 13

Ziffrin v. Reeves, 308 U. S. 132.....10, 20, 24, 26, 31

CONSTITUTION AND STATUTES

Acts of Assembly, 1934, pp. 100-136 .....7, 8, 9,

Alcoholic Beverage Control Act, Sec. 49-a 2, 7

Code of Virginia (Michie, 1942) Sections 4675(1)-4675(69a).... 7

Constitution of United States—Twenty-first Amendment.....4, 27

Regulation 42, Virginia Alcoholic Beverage Control Board..2, 3, 5, 15

Regulation 44, Virginia Alcoholic Beverage Control Board..2, 3, 6, 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 134

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE
APPELLANTS

vs.

THE COMMONWEALTH OF VIRGINIA
APPELLEE

BRIEF OF COMMONWEALTH OF VIRGINIA, APPELLEE

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia, pursuant to which the judgment appealed from was entered, is reported in 181 Va. 306, and in 24 S. E. (2d) 569. See also the opinion in the companion case of *Dickerson* v. *Commonwealth*, 181 Va. 313, 24 S. E. (2d) 550.

GROUNDS FOR JURISDICTION

The appellants challenge the validity of section 49-a of the Virginia Alcoholic Beverage Control Act in so far as it is construed by the court below to authorize the Virginia Alcoholic Beverage Control Board to promulgate certain regulations relating to the transportation by motor vehicle in, into, and through Virginia of alcoholic beverages in quantities in excess of one gallon, and also challenge the validity of said regulations as constituting an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

STATEMENT OF THE CASE

The statute and regulations complained of are set out in the appendix, being section 49-a of the Alcoholic Beverage Control Act and sections 42 and 44 of the regulations of said Board. The provisions of the regulations here complained of are that transportation by motor vehicle carriers through the State of alcoholic beverages in quantities in excess of one gallon is not permitted unless the following requirements are met: (1) The transportation must be accompanied by a bill of lading or other memorandum of shipment showing, (a) the route to be traveled by the vehicle in Virginia, which must be the most direct route from the point of origin to the destination; (b) the name of the consignee, who must be a person who has a legal right to receive delivery of same at point of

destination (Regulation 44); (2) The person transporting the beverages must post a bond in the penalty of one thousand dollars subject to cancellation by the Board, conditioned that he will not unlawfully transport or deliver alcoholic beverages in Virginia (Regulation 42).

The appellants, motor vehicle carriers for hire, were convicted of transporting over the highways of Virginia, in a Ford truck, one hundred and sixty-eight gallons of assorted whiskies, pursuant to an agreed statement of facts showing violation of all of the above requirements of the Board's regulations. The bill of lading did not show the highway route to be traveled in Virginia. It disclosed a consignee in North Carolina, who could not legally receive delivery of the shipment at the place of destination designated. The appellants had not posted with the Board the bond required to permit them to transport the whiskey. These facts are undisputed. (Stipulation of Facts, R. p. 33). The whiskey was acquired in Maryland and was accompanied by a bill of lading showing it was to be delivered to R. M. Willard, trading as Eagle Distilling Company, at Thomasville, North Carolina.

The truck in which the whiskey was being transported was registered in the name of Healton Miller, of Winston-Salem, North Carolina, who pursuant to said section 42 of the regulations of said Board had posted the bond thereby required (R. pp. 34-35). This bond and said sections 42 and 44 of the regulations, the court below held, constituted a permit authorizing said Miller to transport whiskey *within, into,* and *though* the State of Virginia in conformity with said regula-

tions. This permit had been cancelled by said Board, however, about three weeks prior to the date of the transportation here involved, upon information that said Miller had the reputation of being a bootlegger in North Carolina (R. p. 34). Appellants do not contend that Miller's permit would have conferred on them the authority to engage in such transportation, even if it had not been cancelled. The permit was a personal one and was restricted to a particular vehicle. Appellants do not claim even to have been acting as agents for Miller in transporting the whiskey, or that Miller's permit authorized him to employ or utilize them as agents for that purpose. Miller himself made no objection to the cancellation of his permit; in fact, he did not even appear in the case. Appellants do object to the power of the Board to cancel the permit for cause.

QUESTIONS PRESENTED

The following questions are raised by the assignments of error:

A. Are the foregoing requirements with respect to the bill of lading, the bond, and the legal right of the consignee to receive delivery, which are imposed by the regulations governing the transportation of alcoholic beverages within, into, and through Virginia, over its highways, a proper exercise of the police power of the State?

B. Do the appellants, admittedly engaged in transporting whiskey unlawfully and in violation of the

Constitution (Twenty-first Amendment), have any standing in Court to challenge a State regulation pertaining to such unlawful act?

In the discussion of these questions the appellee will endeavor to maintain the following propositions:

SUMMARY OF ARGUMENT

I. The Virginia system of liquor control requires, for the protection of State revenues and the public welfare, that unlawful traffic in alcoholic beverages be suppressed.

II. In the absence of the exercise by Congress of its power to regulate the transportation by motor vehicle of Alcoholic beverages in interstate commerce over the highways of the States, a State may regulate such transportation, and may adopt appropriate measures to prevent the unlawful diversion, delivery, or use of such beverages within its borders.

III. The Court will not strike down nondiscriminatory State regulations intended to confine the interstate movement of alcoholic beverages within legitimate channels unless the Court can say that the regulations are not supported by any reasonable or rational basis.

IV. The requirement of regulation No. 42 with respect to the posting of a bond having the effect of a permit to transport beverages within, into, and through the State is a reasonable and

appropriate measure to prevent unlawful diversion, delivery or use within the State. That the permit shall be revocable for good cause is not an unreasonable condition.

V. The requirement of Regulation No. 44 that a bill of lading or memorandum of shipment shall accompany the transportation, showing the highway route to be traveled, and that said route be the most direct to the point of destination, is a reasonable and appropriate measure to prevent the unlawful diversion, delivery or use of such beverages within the State.

VI. The requirement that the consignee, named in the bill of lading, be a person who has a legal right to receive delivery of the alcoholic beverages in the State of destination is a reasonable and appropriate measure to prevent their unlawful diversion, delivery, or use within the State of Virginia.

VII. Should the Court be of opinion that the challenged regulatory provisions are not within the State's retained power to regulate the transportation of intoxicating liquors in interstate commerce, such regulations are a valid exercise of the power of the State derived from the Twenty-first Amendment.

VIII. The appellants, having admitted as a fact that they were, at the time they were apprehended, engaged in transporting alcoholic beverages into North Carolina, in violation of the laws

of that State and of the Constitution of the United States, are without standing in Court to challenge Virginia's regulation of their actions.

The foregoing propositions will be discussed in the order above set out.

I.

The Virginia System of Liquor Control Requires, for the Protection of State Revenues and the Public Welfare, That Unlawful Traffic in Alcoholic Beverages be Suppressed.

Liquor control has for many years been an acute problem in Virginia. Before the adoption of the Eighteenth Amendment, pursuant to a popular referendum, strict prohibition laws had been enacted by its Legislature. In a similar referendum about seventeen years later a substantial majority voted for repeal of the Eighteenth Amendment, and of the State prohibition laws. Following such repeal, a commission was appointed to recommend to the Legislature a system of liquor control. This commission recommended, in substance, the plan enacted into law by the Virginia Alcoholic Beverage Control Act (Acts 1934, pp. 100-136). (See Michie's 1942 Virginia Code, Sections 4675(1)—4675(69a), inclusive, which includes all amendments of the Act to date). Under this statute the pre-prohibition system of sales of distilled spirits and fortified wines by private licensees was discarded and such sales are permitted only in bottles in stores operated by the Alcoholic Beverage Control Board. The sale of whiskey or other distilled spirits or fortified

wines, by the drink is forbidden. Light wines and beer may be sold either by the drink or in bottles by suitable persons licensed by the Board. Revenue derived from the operation of the State stores takes the place of taxes on wine and distilled spirits. A State tax is imposed on beer, and license taxes on beer and wine licensees.

The statute vests in the Board broad discretionary powers with respect to granting, suspending, and revoking beer and wine licenses, and regulating the licensees' conduct of their businesses.

Section 5(a) of the Act, empowering the Board to make regulations, is as follows:

> "The Board may from time to time make such reasonable regulations, not inconsistent with this act, nor the general laws of the State, as the Board shall deem necessary to carry out the purposes and provisions of this act, and to prevent the illegal manufacture, bottling, sale, distribution and transportation of alcoholic beverages, or any one or more of such illegal acts, and from time to time alter, repeal, or amend such regulations or any of them. Such regulations shall be published at least once in some newspaper published in the city of Richmond and in any other manner which the Board may deem advisable, and upon being so published shall have the force and effect of law. The Board shall certify to the clerks of all circuit courts and city courts of record having criminal jurisdiction copies of all regulations adopted by

the Board; such clerks shall keep on file for public inspection all such regulations certified to them by the Board."

Section 49-a of said Act (Appendix, p. 33) prohibits the transportation of alcoholic beverages within, into, or through the State in quantities in excess of one gallon "except in accordance with regulations" of the Board, and the Board is empowered to adopt such regulations as it may deem necessary "to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations".

In order that the system thus established may be successfully operated, it is essential that substantially all fortified wines and distilled spirits consumed in the State be purchased from State stores. This is necessary to provide proper public revenue, as well as to prevent the well-known evils incident to bootlegging. For these reasons the statute and regulations are designed to restrict the movement of such beverages within legitimate channels. The power of the State to so confine such movements through the State will next be considered.

II.

In the Absence of the Exercise by Congress of its Power to Regulate the Transportation by Motor Vehicle of Alcoholic Beverages in Interstate Commerce over the Highways of the States, a State May Regulate Such Transportation, and May Adopt Appropriate Measures to Prevent the Unlawful Diversion, Delivery, or Use of Such Beverages within its Borders.

Liquor being transported through Virginia in violation of the regulations of the Board is contraband and subject to immediate seizure under the Virginia statute. *Dickerson* v. *Commonwealth,* 181 Va. 313, 327; 24 S. E. (2d) 550, 557. The appellants contend that their conviction of the offense of transporting such contraband is in violation of the Commerce Clause of the Constitution.

The question of the power of the States to regulate matters of local concern, although such regulation affects interstate commerce, or to regulate such commerce itself, in the absence of Federal regulation, has recently been given such exhaustive consideration by this Court in the four cases cited below that it is not believed any good purpose will be served by a review of any prior decisions save those which have a direct relation to the particular facts of this case or the principles applicable thereto. The following are the cases referred to:

California v. *Thompson,* 313 U. S. 109;
Duckworth v. *Arkansas,* 314 U. S. 390;
South Carolina State Highway Department v. *Barnwell,* 303 U. S. 177;
Ziffrin v. *Reeves,* 308 U. S. 132.

These cases, and the many others therein cited, clearly sustain the State's authority to regulate local matters involved in such commerce. The power need not result from an express grant of authority by Congress, such as the Wilson Act or the Webb-Kenyon Act. On the contrary, these decisions clearly establish the principle that the States retained such regulatory power under the Constitution, and that they may continue to exercise it *unless and until such exercise is restricted by an Act of Congress.* These cases hold that such exercise of the power is not in violation of the Commerce Clause, even though the regulation interferes to some extent with interstate commerce. Obviously there are many local matters which must be so regulated since they are of a type not susceptible of uniform nationwide regulation. Because of difference in local conditions, they can be dealt with effectively only by the local authorities who are in close touch with, and familiar with, the problems involved.

These decisions make it clear, however, that a State regulation of or affecting interstate commerce *must not discriminate* against that commerce or interfere with same beyond what is reasonably necessary to accomplish the permitted end.

III.

The Court Will not Strike Down Nondiscriminatory State Regulations Intended to Confine the Interstate Movement of Alcoholic Beverages within Legitimate Channels unless the Court Can Say That the Regulations Are not Supported by Any Reasonable or Rational Basis.

In *South Carolina Highway Department* v. *Barnwell, supra,* Mr. Chief Justice Stone discussess at length the extent to which the judicial function will be exercised in determining the validity of a State regulation involving a burden on interstate commerce. "So long as the State action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the States." (303 U. S. 189.) If the burden is too great, it is the function of Congress to so determine and correct it by appropriate regulation. "But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce" (303 U. S. 190). And in determining the question whether South Carolina's regulation of the weight and width of trucks allowed to travel over its highways constituted an unlawful burden on interstate commerce, the opinion states that the regulation's "constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292. Being a legislative judgment

it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." (303 U. S. 191.)

In *Duckworth* v. *Arkansas*, 314 U. S. 390, this Court evidently gave further consideration to the question whether the judicial power should be more freely exercised to forbid State regulatory legislation of or affecting interstate commerce. While the question is not discussed in the Court's opinion, in his concurring opinion Mr. Justice Jackson seems to express the view that the courts should assume the responsibility of determining the wisdom of such State legislation.

To do so, however, would inject a high degree of uncertainty into nearly all State regulatory legislation, because the field within which Congress exercises the commerce power has been so greatly extended in recent years. Federal regulation of labor relations, and of wages and hours of employment, is now being exercised in nearly all substantial industries and occupations, and in a great many which are of little importance. In agriculture the power of Federal regulation is exercised in the most minute transactions, including the use by a farmer of a small part of his wheat crop wholly for consumption on the farm. *Wickard* v. *Filburn*, 317 U. S. 111, 87 L. Ed. 57 (adv. op.) The foregoing are but illustrative of the broad scope which Federal regu-

lation of local affairs has assumed. It embraces not only matters which in themselves constitute interstate commerce, but has been extended over all transactions "affecting" interstate commerce. It is immaterial, therefore, in determining State or Federal jurisdiction or power to regulate, whether the subject of regulation be termed an "intrastate transaction affecting interstate commerce" or "a transaction in interstate commerce." The Federal power may be exercised alike in either case. Since the sum total of these two types of transactions cover substantially the entire field of business and professional activities, nearly every State regulatory measure "affects interstate commerce", whether Congress has actually entered the field or not. It is obvious, therefore, that to increase the measure and degree of judicial control and supervision over all State regulations *affecting* commerce would result in opening the flood gates of litigation. No regulation could be too local in character to escape challenge in the Courts as an unconstitutional interference with and burden upon commerce. If chaos is to be avoided the problem of division of State and Federal regulatory activities must be left largely to their respective legislative bodies. The Federal Government cannot regulate everything, neither can the States. Experience alone can develop from time to time, through a process of evolution, the respective fields in which each can function to the best advantage.

The *Duckworth case* just referred to sustains the power of the States to regulate the transportation of intoxicating liquor through their borders, and to adopt

effective measures to afford local protection from the attendant dangers to the communities through which it passes. A State regulation requiring a permit to transport liquor through the State was held to be a proper one. Mr. Chief Justice Stone, in his opinion in that case, pointed out that State and National efforts to regulate intoxicating liquors "have not left us unaware of the peculiar difficulties of controlling it or of its tendency to get out of legal bounds", and that the extent of the State's broad power to regulate transportation of intoxicating liquors in commerce is not necessarily a criterion of authority "to regulate other articles of commerce less susceptible to uses injurious to the communities through which they pass".

The appellee will now discuss the application of these established tests and principles to the regulatory provisions here challenged.

IV.

The Requirement of Regulation No. 42 With Respect to the Posting of a Bond Having the Effect of a Permit to Transport Alcoholic Beverages Through the State is a Reasonable and Appropriate Measure to Prevent Unlawful Diversion, Delivery or Use Within the State. That the Permit shall be Revocable for Good Cause Is not an Unreasonable Condition.

The regulation requires a person desiring to engage in the business of transporting alcoholic beverages to post with the Alcoholic Beverage Control Board a bond in the penalty of one thousand dollars. The condition of the bond is that such person will not unlawfully

transport or deliver such beverages in Virginia. The regulation also requires that evidence of the posting of the bond shall accompany the transportation at all times. This evidence, the Court below held, "constituted a permit—a permit to lawfully transport." The regulation applies alike, and without discrimination, to both interstate and local shipments.

Appellants do not challenge the validity of the requirement that the bond be posted by the carrier. Their objection is to the power of the Board to revoke the resulting permit to transport alcoholic beverages into, within, and through the State.

The question whether the power of the Board to revoke the permit violates the Commerce Clause is not properly before the Court on this appeal. It was sought to be injected into the case because the truck in which appellants were transporting the whiskey was registered in North Carolina in the name of one Miller, who had sometime before posted the required bond and been given by the Board evidence thereof in the form of a certificate as follows: "This is to certify That Healton Miller of Winston-Salem, North Carolina, has filed with this Board, bond as required under the regulations governing the transportation of alcoholic beverages *within, into* or *through* the State of Virginia in quantities in excess of one (1) gallon". (Italics supplied.) In the "Evidence of Bond" or certificate Miller is designated as Carrier No. 324, and the vehicle's motor number in which he was permitted to transport such beverages was endorsed on said certificate. (R. pp. 35-36.) There is no evidence that the

vehicle in which appellees were transporting was the one referred to in the certificate. The certificate or permit was cancelled by the Board upon information that Miller was a bootlegger. Concerning this question the Court below said:

> "Miller, the only person who had the right to challenge the cancellation of his bond, is not a party to this proceeding. There is no evidence that he protested the action of the Board. It does not appear from the record what connection he had with the transportation of the whiskey, nor whether Carter and Macemore were his agents. We are not told whether the latter were using the truck with or without Miller's knowledge, or what action, if any, he may have taken to protect his property rights in the truck.
>
> "The bond is conditioned that the carrier will not engage in the unlawful transportation of alcoholic spirits within, into or through the State of Virginia. Evidence of its posting with the Board constituted a permit—a permit to lawfully transport. Cancelled or uncancelled, it gives no one a permit for unlawful transportation.
>
> "Whether or not the appellants might have given an acceptable bond for interstate transportation through Virginia is not an issue here. If such a bond had been given, it would have permitted lawful transportation, but it would have afforded no defense to an unlawful carriage.
>
> "The requirement for the posting of a bond is a regulation of a police nature. The Board having the authority to require the bond, under the police powers conferred upon it by the A.

B. C. Act, had the right to cancel it with or without notice under the same power if, in the exercise of a reasonable discretion, it was satisfied that it was being used or about to be used against the public safety and welfare.

"It is not to be presumed that the authority of the Board will be arbitrarily used; but in the event that it is abused, a person feeling himself aggrieved may seek judicial relief in the courts." (R. pp. 41-42.)

Thus, the Court having held that appellants were without standing to challenge the authority of the Board to cancel the bond or permit, what the Court said with respect to such authority was a mere dictum. But even if this were not the case, the interpretation of the statute by the Court was obviously correct. Miller's permit authorized him to transport such beverages not only *through* but also *into* and *within* the State. The dictum of the Court below obviously did not express any view as to the authority to revoke a permit restricted to transportation *through* the State or the effect of the *Commerce Clause* with respect to such authority. Neither the regulation nor the statute contains any provision providing for the revocation of any permits.

But even if the court had construed the statute as authorizing the Board to revoke a permit to transport only through the State, it is submitted such interpretation would not have violated the Commerce Clause. As said by the court below, "The bond required under section 42 of the regulations is for the purpose of insuring the fitness and integrity of the carrier of the liquor.

It is evidence of his responsibility and a guaranty of lawful transportation. It confines the transportation to a channel deemed trustworthy". (R. p. 41.)

The permit is a liberal one in its nature. It is not restricted to a designated trip on a particular day but authorizes the carrier to engage generally in the business of transporting beverages, (a) between points within the State, (b) from a point without the State to a point within, and also (c) through the State. Certainly a person engaged in the unlawful business of bootlegging liquors cannot demand or expect the granting of or continuation of a permit for any one of these types of transportation. Such a person may be expected to sell his wares in Virginia as well as elsewhere, if the opportunity offers. The permit would provide him with an effective cloak to conceal such unlawful enterprise within the State. The permittee, even though allowed to transport *through the State only*, might actually intend to deliver the beverages to some bootlegger in Virginia not legally entitled to receive delivery. In order to conceal his actual intention, the bill of lading would designate a consignee in another State as a protection in case his shipment should be apprehended. If he names a lawful consignee who had no agreement to receive the shipment, he would run the risk of exposure. He might, therefore, consign the shipment to a partner in the enterprise residing in another State not entitled to receive delivery there. Obviously the character and responsibility of a person permitted to transport intoxicating liquors in motor vehicles over the highways of the State is a most im-

portant consideration, whether the destination of the shipment purports to be within or outside the State. This was recognized by this Court in the case of *Ziffrin* v. *Reeves, supra,* which involved the validity of a Kentucky statute restricting the transportation of distilled spirits to common carriers. A contract carrier was refused a license to transport such beverages from a Kentucky distillery to consignees in Chicago, and challenged the statute as violating the commerce, due process and equal protection clauses of the Constitution. In sustaining the right of the State to confine such *interstate* transportation of distilled spirits to common carriers, this Court said that "A licensed Common Carrier is under stricter control than an ordinary contract carrier and may be entrusted with privileges forbidden to the latter. Here the law creates no discrimination against interstate commerce. It is subjected to the same regulations as those applicable to intrastate commerce."

The *Ziffrin case* holds that the State may lawfully prohibit a contract carrier from transporting within its borders alcoholic beverages moving in interstate commerce with a destination beyond the State, even though the consignee there may lawfully receive the same. If the State can absolutely prohibit such transportation by a carrier for hire or contract carrier, it certainly may revoke a permit so to transport in case the permittee is found to be a person of unsuitable character, such as one engaged in the unlawful business of bootlegging. As said in the *Ziffrin case,* "the greater power includes the less".

Appellants seek to distinguish the *Ziffrin case* be-

cause the shipments involved originated in Kentucky, though destined for points outside the State. But the shipment was an interstate one and the principle involved is the same. Kentucky was endeavoring to prevent unlawful diversions of the liquor within the State, and that is exactly what Virginia is trying to do. In the *Duckworth case, supra,* this protective power of the State was held to extend also to transportation of such beverages *through* the State.

In *California* v. *Thompson,* 313 U. S. 109, this Court sustained the State's power to require a nondiscriminatory license of a transportation agent engaged in selling or negotiating transportation over the public highways of the State, to restrict such licenses to persons possessing the requisite fitness therefor, and to require a bond conditioned upon the faithful performance of the contracts they negotiate. The fact that the transportation negotiated was interstate was held not to affect the statute's validity, since Congress has not undertaken to regulate such transactions.

Obviously it is of greater importance to the welfare of the people of a State that a person permitted to engage in the business of a carrier of intoxicating liquors over the State's highways possess the requisite fitness therefor, than that only a fit person be licensed to negotiate motor vehicle transportation.

Appellants argue that the Board may be arbitrary in its actions with respect to revoking permits, and contend that no recourse to the courts is provided in such cases. But the court below, in the portion of its opinion above quoted, held that "a person feeling

himself aggrieved may seek judicial relief". Appellants argue that because the Board's action is a discretionary one and mandamus will not lie, therefore no remedy exists. The obvious answer is that a court of equity will enjoin the further withholding of the permit by the Board if it has been revoked without just cause.

In conclusion on this point, should the Court consider the question properly before it, it is submitted that a State may properly revoke a permit given a carrier for hire to transport liquor over its highways and through the State if such permittee is found to be a person unfit and unsuitable to be entrusted with that privilege, and that the exercise of such power is not an unreasonable obstruction of interstate commerce.

V.

The Requirement of Regulation No. 44 That a Bill of Lading or Memorandum of Shipment Shall Accompany the Transportation, Showing the Highway Route to be Traveled, and That Said Route Be the Most Direct to the Point of Destination, Is a Reasonable and Appropriate Measure to Prevent the Unlawful Diversion, Delivery or Use of Such Beverages within the State.

Appellants do not question the propriety of requiring the bill of lading accompanying the shipment to designate the highway route in the State over which the alcoholic beverages are to be transported. But they challenge the reasonableness of the requirement that such designated route be the "most direct route from the consignor's place of business to the place of business

of the consignee", and that the carrier shall not depart from said route.

Appellants argue, first, that the carrier might be inconvenienced in having to consult the road maps to ascertain the proper route. But a legitimate carrier would do this regardless of the regulation, for reasons of economy. It is to his own interest to travel over the most direct route through the State. It is fanciful to suggest that a person engaged in the general business of a carrier for hire through Virginia would not inform himself on this subject.

The obvious purpose of the requirement is to prevent a carrier, so far as possible, from delivering contraband whiskey in Virginia under pretense, if apprehended, of being engaged in through transportation, or in transportation from one point in the State to another in the State. If he is found transporting same over a highway which is not the most direct, established one for the pretended journey, the chances are the shipment is not a *bona fide* one, that he really intends to deliver it to someone other than the named consignee. Of course, if every carrier was absolutely dependable and law abiding, there would be no necessity for any regulations. Unfortunately, it is a matter of common knowledge that this is not true. The lucrative profit incident to the illicit traffic in liquor has resulted in the creation of nationwide organizations engaged in pursuit of such unlawful gains. If the permittee, on one pretense or another, were allowed to ramble over the State at will under the protection of an unrestricted permit, there would be no effective regulation at all. It would be

necessary to catch him in the act of making an unlawful delivery a most difficult thing to do, before he could be apprehended or punished. He might be found transporting at a point in Virginia a hundred or more miles from his proper route, in the course of making an unlawful delivery, and yet such a permit would shield him from arrest.

Appellants' third argument is that the carrier for hire might desire to transport other articles than liquor to a point in another section of the State and adherence to the direct route would entail an unnecessary burden and expense. But it would be very easy for a permittee desiring to make an unlawful delivery of liquor at a point off the direct route to arrange a consignment of articles other than liquor to the person to whom it was really intended to deliver the liquor. This would furnish a legally justifiable reason for his presence at the place of intended unlawful delivery.

In this connection, attention is again called to the holding of this Court in the *Ziffrin* case that the State is not compelled to permit the transportation in interstate commerce of alcoholic beverages by contract carriers. The demands for such transportation through the State are adequately met by the facilities of common carriers. If the carrier for hire finds that he cannot profitably engage in that business in conformity with the State's regulations, he may leave that to the common carriers. It is a matter of common knowledge that nearly all such legitimate transportation, as a matter of fact, is conducted by the railroads and railway express companies. Even if Virginia should not permit con-

tract carriers and carriers for hire to engage in such transportation no real obstruction to the movement of alcoholic beverages in interstate commerce would result therefrom.

VI.

The Requirement That the Consignee, Named in the Bill of Lading, Be a Person Who Has a Legal Right to Receive Delivery of the Alcoholic Beverages in the State of Destination Is a Reasonable and Appropriate Measure to Prevent Their Unlawful Diversion, Delivery or Use within the State of Virginia.

The purpose of the above requirement is to prevent for hire or contract carriers, who are liquor law violators, from transporting alcoholic beverages over the highways of the State. Carriers haul in large quantities and it is essential, in order to guard against unlawful deliveries in Virginia, that every reasonable precaution be taken to assure that persons permitted to engage in the business of transporting liquor over such highways are reliable and trustworthy. The requirement that the consignee be legally entitled to receive delivery of the beverages applies alike to intrastate as well as interstate shipments and does not discriminate against interstate commerce. A carrier who will transport into North Carolina and make delivery in that State in violation of its laws will not hesitate to make unlawful deliveries in Virginia if it is to his advantage to do so. The bill of lading showing an unlawful consignee in another State may well be a device to cover up and conceal the carrier's actual intention to

sell or deliver the liquor in Virginia. If such a consignment should be held to have the legal effect of protecting him from arrest and conviction for unlawful transportation, it would be necessary to catch him in the act of such selling or delivering in order to punish him for violation of the statute.

A State regulation of a local matter affecting interstate commerce which is designed to confine to persons of good character and responsibility those engaging in activities fraught with dangers to the welfare of the people of the State is a proper and reasonable exercise of the police power. *California* v. *Thompson, supra.* Since the State may forbid any transportation at all within its borders of alcoholic beverages in interstate commerce by contract carriers (*Ziffrin* v. *Reeves, supra*), it must necessarily follow that it may forbid carriers of this type from engaging in transportation which itself is an essential part of an unlawful enterprise.

Appellants argue that the requirement is obstructive of interstate commerce because the carrier might be misled as to the right of the consignee to receive delivery in the other State. The same argument would be equally applicable to an unlawful consignee in Virginia. If ignorance or pretense of ignorance of the law could be availed of during transportation, it would be equally a defense at the time of or after delivery. The regulation is designed to insure a responsible permittee; one who will inform himself that what he is doing is not a crime. The illicit liquor traffic reached huge proportions during prohibition. It is perhaps the most difficult problem to control involved in govern-

ment. Fanciful or imaginary obstructions to commerce should not be permitted to further increase the burden of controlling it. The proper interstate movement of alcoholic beverages is in no degree dependent upon contract or for hire carriers. In fact this seems to be a very unsatisfactory method of transporting such a troublesome article as intoxicating liquor. If a bill of lading indicating that such a shipment is intended to be delivered to an unlawful consignee in another State should be held to have the legal effect of a permit to transport it through Virginia, the State would be helpless to exercise any effective control over unlawful deliveries within its borders.

VII.

Should the Court Be of Opinion that the Challenged Regulatory Provisions Are not within the State's Retained Power to Regulate the Transportation of Intoxicating Liquors in Interstate Commerce, Such Regulations are a Valid Exercise of the Power of the State Derived from the Twenty-first Amendment.

The Twenty-first Amendment provides that the transportation or importation into a State "for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

In *Duckworth* v. *Arkansas, supra*, this Court affirmed a conviction of violating a State statutory regulation requiring a permit to transport distilled spirits through that State. The liquor was admittedly being transported with the intention of taking it into Mississippi for sale there in violation of its laws. However, the

Court considered it unnecessary to determine the effect of this intended violation of the Twenty-first Amendment. The validity of the permit regulation was sustained as being a proper exercise of the police power of the State over local matters involved in interstate commerce.

Appellants seek to escape the decision in the *Duckworth case* because the requirements imposed on the permittee by the Virginia regulations were not attached to the permit provided for by the Arkansas statute. These requirements hereinbefore discussed, are the posting of a bond, having the effect of a permit; and that a bill of lading accompany the shipment showing the highway routes to be travelled in Virginia, which must be the most direct route suitable for the journey, and showing also the name of a consignee legally entitled to receive the shipment at the place of destination.

Virginia does not contend that the State possesses the power to prohibit shipments through its borders of intoxicating liquors in legitimate interstate commerce. The Twenty-first Amendment does, however, recognize the supremacy of all laws of the State reasonably designed to prevent the delivery or use therein of intoxicating liquors in violation of its statutes. And as before pointed out, that is exactly what these regulations are intended to accomplish. The mere assertion or representation by a transporter of such liquors that he intends to or will continue the transportaation through the State is not necessarily true. He may actually deliver the liquors in Virginia. If the State laws are to be made effective it is necessary to employ

adequate measure to insure, as far as practicable, that the shipment is, in fact, a through one and that there will be no delivery of the liquor within the State in violation of its laws. Since it would be an undue burden to undertake to convoy such shipments, the regulations are designed to restrict the for hire and contract carriers engaged in such transportation, to responsible persons of good character upon whom reliance can be placed that they will not violate the State laws. The carrier is not required to notify the Board in advance when he will transport a shipment of liquor, so that no surveillance is possible unless the enforcement officers receive such information from other sources. As a further safeguard such carriers are not allowed to roam at will over the State. They are required to travel over the most direct established route.

As the appellee has herein before endeavored to show in discussing these several requirements of the regulations, they are reasonable and necessary to prevent the delivery or use of motor vehicle shipments of liquor in violation of the laws of the State and of the Twenty-first Amendment.

VIII.

The Appellants, Having Admitted as a Fact That They Were, At the Time They Were Apprehended, Engaged in Transporting Alcoholic Beverages into North Carolina, in Violation of the Laws of That State and of the Constitution of the United States, Are Without Standing in Court to Challenge Virginia's Regulation of Their Actions.

The appellants assert the right to challenge the Virginia regulations relating to the transportation of alcoholic beverages by motor vehicle carriers, although they say they were engaged in transporting such beverages from Maryland through Virginia for the purpose of importing it into and delivering it in North Carolina in violation of the laws of that State. Such intended importation and delivery likewise constitute a violation of the Twenty-first Amendment. As pointed out by Mr. Justice Jackson in a concurring opinion in the *Duckworth case, supra*, they invoke the protection of the Commerce Clause to enable them to violate the Twenty-first Amendment. The question whether the Commerce Clause affords such protection is of vital importance in the efforts of the States to control the illicit traffic in intoxicating liquors. If it does, then a person is entitled to demand a permit to use the highways of one State in order to violate the laws of another, or else carry on the transportation without a permit. While it is true that in this case the violation of the North Carolina law and the amendment were not actually consummated, the transportation through Virginia was an essential part of the enterprise. It is significant that three cases have been appealed to

this Court in the last three years in which the transporters admitted they intended to make deliveries in another State which are prohibited by said amendment. They seem most eager for an adjudication of this question. A decision by this Court that the Commerce Clause protects such transportation through States other than that in which it is claimed the delivery is to be made would obviously facilitate the illegal traffic and greatly reduce the risk of punishment. It would make no difference in which State the illegal transporter might be apprehended, because he could easily provide himself with documents showing an intention to deliver the shipmnet in another State, and thus invoke the protection of the Commerce Clause. In *Ziffrin* v. *Reeves, supra*, this Court held that whiskey removed from permitted channels and declared contraband by the Kentucky statute "cannot be regarded as a proper article of commerce". Upon the same principle, whiskey intended to be employed to violate the Twenty-first Amendment cannot be so regarded. The commerce power was conferred on Congress to promote legitimate commerce between the States, not to protect or facilitate the commission of a crime against a State where the criminal act itself is prohibited by the Constitution. It is difficult to perceive, in the light of the principles enunciated in recent deicsions of this Court, how a State regulation which prevents a shipment admittedly intended to violate the Constitution, can be said to be an improper burden on or obstruction of interstate commerce. Such a shipment of intoxicating liquors is not within the protection of the Commerce Clause and

the appellants are without standing to invoke it or to challenge the regulation. See the following cases cited in the footnote of Mr. Justice Jackson's opinion in the *Duckworth case, supra:*

New York ex rel Hatch v. *Reardon*, 204 U. S. 152, 160;

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 583;

Premier Pabst Sales Co. v. *Grosscup*, 298 U. S. 226, 227.

CONCLUSION

The judgment of the court below is clearly right and should be affirmed.

Respectfully submitted,

ABRAM P. STAPLES
Attorney General of Virginia.

APPENDIX

Section 49-a of Alcoholic Beverage Control Act of 1936, Michie's Va. Code of 1942, Sec. 4675 (49a).

"Section 4675 (49a). *Transportation; transportation permits; penalties.*—The transportation of alcoholic beverages, other than wine and beer, purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia, in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act within, into or through Virginia in quantities in excess of one gallon, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic

beverages other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675 (62). (1936, p. 434.)"

Regulations of Alcoholic Beverage Control Board, Section 42 (Order No. A-1, Aug. 30, 1940).

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act, as Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and or deliver any alcoholic beverages within, into, or through the State of Virginia; and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall

be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

Regulations of Alcoholic Beverage Control Board, Section 44 (Order No. A-1, Aug. 30, 1940).

"Section 44. Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment, signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor; the name and address of the consignee; the route

to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or other memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

J. Frankfurter 2, 3, 4,

SUPREME COURT OF THE UNITED STATES.

Nos. 134 and 198.—October Term, 1943.

John Thomas Carter and Eugene Pearson Macemore, Appellants, 134 *vs.* The Commonwealth of Virginia. Earl Dickerson, W. O. Page, et al., Appellants, 198 *vs.* Commonwealth of Virginia.	Appeals from the Supreme Court of Appeals of the State of Virginia.

[January 31, 1944.]

Mr. Justice Reed delivered the opinion of the Court.

The appellants were convicted of violations of the Virginia Alcoholic Beverage Control Act[1] and certain Regulations issued pursuant to it, concerning the transportation of intoxicating liquor through the Commonwealth. Their contention that the pertinent provisions of the Act and Regulations[2] violated the Commerce Clause, Article I, Section 8(3), of the Federal Constitution was rejected by Virginia's highest court, the Supreme Court of Appeals. 181 Va. 306, 313. The cases are here on appeals pursuant to Section 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

The Act in question contains a comprehensive scheme for the control of trade in alcoholic beverages within the territory of Virginia. By the statute an Alcoholic Beverage Control Board is established and authorized to adopt such regulations "as it may deem necessary" to confine the transportation of liquor "to legitimate purposes."[3] The A. B. C. Board promulgated regulations

[1] Michie's Virginia Code (1942) Sec. 4675.

[2] Regulations of the Virginia Alcoholic Beverage Control Board, Sections 42, 44.

[3] Virginia Code Section 4675(49a). "Transportation; transportation permits; penalties.—The transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia in quantities in excess of one gallon is prohibited except in accordance with

applicable to transportation through Virginia.[4] The requirements here in issue are these: (1) The vehicle must use the most direct route and carry a bill of lading showing the route it will travel; (2) The carrier must post a bond in the penal sum of $1000 conditioned on lawful transportation; and (3) The bill of lading must show the name of the true consignee, and that consignee must have a legal right to receive the beverages at the stated destination.

Both cases reached the Virginia Supreme Court on stipulated facts. In No. 134, it was agreed that Carter and Mackmore received 168 gallons of whiskey from a wholesaler in Maryland for transportation to an individual consignee in Thomasville, North

---

regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcholic beverages, other than wine and beer purchased from persons licensed to sell same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through Virginia in quantities in excess of one gallon as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations. . . ."

[4] Section 42 of the Regulations provides: "Before any person shall transport any alcoholic beverages within, into, or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation. . . ."

Section 44 reads as follows: "Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Section 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported; the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

Carolina. The appellants were apprehended in Rappahanock County, Virginia, while carrying the whiskey by truck. The appellants themselves did not post a bond, and a bond which was posted by the registered owner of the truck was cancelled because he was reputed to be a bootlegger. Their bill of lading did not show the route to be traversed through Virginia, and the intended delivery to the consignee was forbidden by the laws of North Carolina.

The facts stipulated in No. 198 are similar. Dickerson was arrested in Prince William County, Virginia, while driving a truck carrying more than one gallon of alcoholic beverages. He was traveling by the most direct route from Maryland to his employer-consignee, Page, in North Carolina. Page had posted the required bond, but the bill of lading did not show the route to be traveled, and Page was forbidden by the laws of North Carolina to accept delivery there.

All the individuals involved in the two cases were residents of North Carolina.

The appellants argue, first, that the Twenty-first Amendment gives Virginia no power to prohibit absolutely the shipment of liquor from Maryland to North Carolina through Virginia; second, that its power to regulate such shipments is limited by the Commerce Clause to regulations reasonably necessary to enforce its local liquor laws and not unduly burdensome on interstate commerce; third, that Virginia has no authority to penalize prospective violations of the criminal laws of North Carolina or the United States. It will be observed that the intoxicating liquors in question are intended for continuous shipment through Virginia, so that here, as in the *Duckworth* case,[5] a different question arises from those considered under the Twenty-first Amendment,[6] where transportation or importation into a state for delivery or use therein was prohibited. But we may put aside the first and third contentions, for we are satisfied that Virginia may, notwithstanding the Commerce Clause and independently of the Twenty-first Amendment, in order to protect herself from illicit liquor traffic within her borders, subject the shipment of liquor through Virginia to the regulations here in question.

[5] Duckworth *v.* Arkansas, 314 U. S. 390, 392-3.

[6] See State Board *v.* Young's Market Co., 299 U. S. 59; Mahoney *v.* Joseph Triner Corp., 304 U. S. 401; Brewing Co. *v.* Liquor Comm'n, 305 U. S. 391; Joseph S. Finch & Co. *v.* McKittrick, 305 U. S. 395.

We have recognized that the several states in the absence of Federal legislation may require regulatory licenses for through shipments of liquor in order to guard against violations of their own laws. *Duckworth* v. *Arkansas*, 314 U. S. 390. Thus this Court has extended to this very field its recognition that regulation of interstate commerce by local authority in the absence of Congressional action is admissible to protect the state from injuries arising from that commerce. *California* v. *Thompson*, 313 U. S. 109, 113, 115, and cases cited; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 591; *Morf* v. *Bingaman*, 298 U. S. 407, 410; *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267. The commerce power of Congress is not invaded by such police regulations as Virginia has here enforced.

The state of transit may compel the carrier to furnish information necessary for checking the shipment against unlawful diversion, and the requirement that the truck follow a direct, stated route is within the rule of *Duckworth* v. *Arkansas*, *supra*. Similarly, a state may require a reasonable bond of one who wishes to engage in interstate trade of a kind dangerous to well-recognized local interests. *California* v. *Thompson*, 313 U. S. 109.

The state court did not pass upon the legality under state or Federal law of the cancellation of the bond in No. 134, since it concluded that only the bondsman, who was not a party to the proceeding, had standing to object under applicable state procedure. As no procedural due process point is raised, we accept its conclusion without further examination. *United Gas Co.* v. *Texas*, 303 U. S. 123, 139. It is urged, however, that the Board's power to cancel a bond because of doubts as to the trustworthiness of the bondsman amounts to an undue burden on interstate commerce.

The bond is to be furnished, according to Section 42 of the Regulations, by the person transporting the liquor. Thus the requirement that the bond be signed by a responsible person appears to raise the same type of question as the requirement that delivery be lawful at the place of consignment, and the two may be considered together. Of the latter rule, the Virginia court said,

"We cannot escape the conclusion that one who deliberately and intentionally violates the Federal Constitution and the law of his resident State, in the unlawful transportation of liquor would hardly hesitate to violate the laws of this state while passing

through if he thought he might profit thereby. We cannot shut our eyes to the possibilities of such a situation and the necessity of prevention."

We are therefore dealing with a case in which Virginia is attempting no more than the enforcement of her own laws; she is not seeking to inflict punishment for the violation of the laws of North Carolina. Whether or not she is entitled thus to enforce her laws must be judged in the light of our long-standing recognition of the exceptional problems involved in successfully regulating trade in intoxicating liquors. *James Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 332; *Duckworth* v. *Arkansas*, *supra*, at 396. We do not consider the appellee's suggestion that complete exclusion (and hence these partial restraints) of motor carriers from the through liquor traffic and a limitation of through transit to rail carriers would be consonant with the Commerce Clause. Cf. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 140. Whatever may be the effect of the Twenty-first Amendment, this record presents no problem that may not be resolved under the Commerce Clause alone. That Clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution *pro tanto* of absolute state sovereignty over the same subject matter. The Twenty-first Amendment limits that grant of power as to intoxicating liquor by prohibiting "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein . . . in violation of the laws thereof." By interpretation of this Court the Amendment has been held to relieve the states of the limitations of the Commerce Clause on their powers over such transportation or importation.[7] It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the Amendment. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 535, 538. But in the present case we need not consider the power of Virginia under the Twenty-first Amendment to regulate through shipments. It is enough that Virginia could conclude, in the absence of contrary Federal legislation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws[8] and the laws of a neighboring state.

[7] State Board v. Young's Market Co., 299 U. S. 59; Brewing Co. v. Liquor Comm'n, 305 U. S. 391.

[8] Twenty-first Amendment, Section 2; 27 U. S. C. § 122.

By her ruling she has imposed no substantial clog on whatever cognate rights her sister states may have to determine their own policies regarding intoxicating liquors and to receive alcoholic beverages in interstate commerce, if they so desire.

For these reasons the judgment is

Affirmed.

Mr. Justice JACKSON concurs in the result only, for the reasons stated in his separate opinion in *Duckworth* v. *Arkansas*, 314 U. S. 390.

SUPREME COURT OF THE UNITED STATES.

Nos. 134 and 198.—October Term, 1943.

John Thomas Carter and Eugene Pearson Macemore, Appellants, 134 *vs.* The Commonwealth of Virginia.	Appeals from the Supreme Court of Appeals of the State of Virginia.
Earl Dickerson, W. O. Page, et al., Appellants, 198 *vs.* Commonwealth of Virginia.	

[January 31, 1944.]

Mr. Justice Black, concurring.

I am not sure that state statutes regulating intoxicating liquor should ever be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes. Cf. dissenting opinions, *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 183; *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 442; *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, 316. The Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce. Though the precise amount of power it has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: local, not national, regulation of the liquor traffic is now the general Constitutional policy. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391; *State Board of Equalization of California* v. *Young's Market Co.*, 299 U. S. 59.

Whatever limited force the Commerce Clause may retain with regard to the liquor traffic, it should not require the invalidation of the Virginia statutes here involved, which do not conflict with any Act of Congress, and which are designed to enforce local liquor policies. Virginia seems to think that, unless adequate precautionary regulations are devised and enforced, liquor shipments ostensibly being transported through her territory to a neighboring

state could be diverted for bootleg purposes contrary to her laws. Such precautionary regulations must come from either Virginia or the federal government. The legislature of Virginia has provided them; the Congress has not. This Court could invalidate the Virginia regulations, but only the Congress could devise and substitute effective federal regulations to take their place. I therefore agree with the Court "that Virginia could conclude, in the absence of contrary Federal legislation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws and the laws of a neighboring state."

SUPREME COURT OF THE UNITED STATES.

Nos. 134 and 198.—October Term, 1943.

John Thomas Carter and Eugene Pearson Macemore, Appellants, 134 *vs.* The Commonwealth of Virginia.	Appeals from the Supreme Court of Appeals of the State of Virginia.
Earl Dickerson, W. O. Page, et al., Appellants, 198 *vs.* Commonwealth of Virginia.	

[January 31, 1944.]

Mr. Justice Frankfurter, concurring.

1. After as thorough a consideration as it ever gave to a problem, this Court, in a long series of cases beginning with *Bowman* v. *Chicago etc. Railway Co.*, 125 U. S. 465, decided that intoxicating liquor is a legitimate subject of commerce, as much so as cabbages and candlesticks, and as such within the protection of the Commerce Clause. In the absence of regulation by Congress, the movement of intoxicants in interstate commerce like that of all other merchantable goods was "free from all state control." *Clark Distilling Co.* v. *West'n Md. Ry. Co.*, 242 U. S. 311, 323, 327, citing *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Vance* v. *W. A. Vandercook Company (No. 1)*, 170 U. S. 438; *Rhodes* v. *Iowa*, 170 U. S. 412. All of these decisions are still on the books. And so, before the Twenty-first Amendment displaced the Eighteenth, Mr. Justice Holmes was able to say: "I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it." *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 169.

2. If then the Commerce Clause be the measure of State action, such a requirement as the posting of a bond for transportation of goods from without Virginia would be beyond Virginia's powers even if the shipment of the liquor were for delivery into Virginia. *Heyman* v. *Southern Railway Co.*, 203 U. S. 270; *Adams Express*

Heyman v. Hays, 236 U.S. 178

Co. v. *Kentucky*, 206 U. S. 129. Cases like *California* v. *Thompson*, 313 U. S. 109, which recognize the power of States to regulate local activities by taxation or otherwise related even though they be to interstate commerce, but none of which was concerned with restricting the through-passage of goods, liquor or any other, afford no basis for suggesting that a State has power to license the movement of goods in interstate commerce on oppressive or prohibitive terms. *A fortiori*, the Commerce Clause would prohibit and not permit such legislation as is before us in the case of liquor arriving in Virginia for ultimate delivery without.

3. In the light of the uniform current of decisions under the Commerce Clause prior to the Twenty-first Amendment, the Virginia legislation could not survive as to shipments bound beyond its borders. If the legislation is valid, as I believe it to be, it must be solely because the range of State control over liquor has been extended by the Twenty-first Amendment beyond the permissive bounds of the Commerce Clause.

4. The legislation is sustainable under the Twenty-first Amendment on one of two considerations. It is a notorious fact that State prohibition laws were to no small measure evaded by illicit diversion of liquor claimed to be transported through a State. Since we are dealing with a constitutional amendment that should be broadly and colloquially interpreted, liquor that enters a State in the manner in which the liquor here came into Virginia may, without undue liberty with the English language, be deemed to be for "delivery" there even though it is consigned for another State. The Twenty-first Amendment prohibits the "transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof", not when the liquor is for delivery *and* use but for "delivery *or* use therein". In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. The decision in *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, has nothing whatever to do with the relation of the Commerce Clause to the power given the States by the Twenty-first Amendment to control the liquor traffic. That was a suit "to restrain enforcement of the [California] Alcoholic Beverage Control Act within Yosemite Park, on the theory that the Park is within the exclusive jurisdiction of the United States". All that was there decided, after extended consideration of the relation of the United States to the Yosemite Park, was that the United States did exercise

exclusive jurisdiction over the land ceded by California to the Federal Government for park purposes, and that of course when "exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." 304 U. S. at 538. State control must yield to superior federal power, but State control by one State, since the Twenty-first Amendment, need not yield to State control by another State.

5. In the alternative, since Virginia has power to prohibit the importation of liquor within that Commonwealth, it may effectuate that purpose by measures deemed by it necessary to prevent evasion of its policy by pretended through-shipments. In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause. If a State may take these protective measures, as surely it may, who is to decide what measures are necessary for its protection? If a State may ask for the posting of a $1,000 bond, may she not require a $10,000 bond? If a State should urge that its experience shows that any regulatory system is ineffective because illicit diversion is too resourceful for control by mere regulation and requires prohibition, who is to say, in view of the history embedded in the Twenty-first Amendment, that a State may not fairly act on such a judgment? Are not these peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were before the Twenty-first Amendment?

6. It is now suggested that a State must keep within "the limits of reasonable necessity" and that this Court must judge whether or not Virginia has adopted "regulations reasonably necessary to enforce its local liquor laws". Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment.

7. Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a "reasonable regulation" of the liquor traffic. The issue was fairly presented in *Mahoney* v. *Triner Corp.*, 304 U. S. 401. And this was the holding:

> "We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market case,* [299 U. S. 59] p. 62, 'involve not a construction of the Amendment, but a rewriting of it.'" 304 U. S. at 404.

Therefore if a State, in aid of its powers of prohibition, may regulate, without let or hindrance by courts regarding the "reasonableness" of a regulation, it may do so whether the liquor is openly consigned for consumption within it or intended for consumption there although, by subterfuge too difficult to check, nominally destined elsewhere.

8. Fuller consideration has therefore convinced me that the power exercised by the State in *Duckworth* v. *Arkansas,* 314 U. S. 390, as well as in this case must rest on the authority given to the States by the Twenty-first Amendment. And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play. So this Court has twice ruled. "Since the Twenty-first Amendment, as held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Brewing Co.* v. *Liquor Comm'n,* 305 U. S. 391, 394; see also *Finch & Co.* v. *McKittrick,* 305 U. S. 395, 398.

[299 U.S. 59]